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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

Warren deSambourg, Mary Burns deSambourg, Albert L. Schell, Jr., Rosalie Elizabeth Tilloy Schell, Sadie Perino, Joseph Perino, Joann Perino, Linda Perino, Charles Mancuso, Angelina Licciardi Mancuso, Joseph Seibert, Sr., Mary Sciambra Seibert, Marie Elena Melerine, Anthony LaGreco, Jr., Salvadore DiCarlo, Emile LaGreco, Joseph LaGreco, Linda Ann Mustacchia LaGreco, Edmond E. Himel, Jr., Erica J. Himel Heier, and Henry G. Heier,

Petitioners,

vs.

The Plaquemines Parish Government, State of Louisiana,

Respondent.

Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

MACK E. BARHAM,
Counsel of Record
ROBERT E. ARCENEAUX
MATTHEW K. BROWN
BARHAM & ARCENEAUX, A PLC
650 Poydras Street, Suite 2700
New Orleans, LA 70130
Telephone: (504) 525-4400

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Can Louisiana take riparian landowners' property located above the ordinary high water mark of a river as defined by federal law, and far removed from the "bed" of the river, without payment of just compensation by simply redefining the "ordinary high water" of a river so as to relocate the ordinary high water mark well above lands that are subject only to periodic overflow simply in order to come within the "batture" exception to the Fifth and Fourteenth Amendments?

PARTIES BELOW

Petitioners, Warren deSambourg, Mary Burns deSambourg, Albert L. Schell, Jr., Rosalie Elizabeth Tilloy Schell, Sadie Perino, Joseph Perino, Joann Perino, Linda Perino, Charles Mancuso, Angelina Licciardi Mancuso, Joseph Seibert, Sr., Mary Sciambra Seibert, Marie Elena Melerine, Anthony LaGreco, Jr., Salvadore DiCarlo, Emile LaGreco, Joseph LaGreco, Linda Ann Mustacchia LaGreco, Edmond E. Himel, Jr., Erica J. Himel Heier, and Henry G. Heier, were plaintiffs-appellants in the proceedings before the Louisiana Supreme Court.

Respondent, the Plaquemines Parish Government, State of Louisiana, was defendant-appellee in the proceeding before the Louisiana Supreme Court. The Board of Commissioners of the Grand Prairie Levee District, Parish of Plaquemines, State of Louisiana, was the originally named defendant. During the pendency of this suit, the Levee Board was succeeded by the Plaquemines Parish Government, which assumed the Levee Board's powers and obligations. The Plaquemines Parish Government was substituted for the Levee Board, and the caption of the suit was changed to reflect this correction. However, the Louisiana Supreme Court's caption failed to reflect the amendment. A motion is presently pending with that court, seeking correction of the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD BE GRANTED 11

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

101 Ranch v. United States, 714 F.Supp. 1005 (D.N.D.), *aff'd*, 905 F.2d 180 (8th Cir. 1990)..... 12

A. K. Roy v. Board of Commissioners, 238 La. 926, 117 So.2d 60 (1960)..... 23

Alabama v. Georgia, 64 U.S. (23 How.) 505, 16 L.Ed. 556 (1859)..... 25

Belmont v. Umpqua Sand & Gravel, Inc., 373 Or. 581, 542 P.2d 884 (1975)..... 23

Board of Trustees of Internal Imp. Trust Fund v. Walker Ranch General Partnership, 496 So.2d 153 (Fla. App. 1986), *review denied*, 504 So.2d 766 (Fla. 1987)..... 24

Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973)..... 11, 13, 21, 29

Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935).....14, 15

Borough of Ford City v. United States, 345 F.2d 645 (3rd Cir. 1965), *cert. denied*, 382 U.S. 902, 86 S.Ct. 236, 15 L.Ed.2d 156 (1965)..... 23

Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners, 160 La. 727, 1107 So. 506 (1925) 6

Buttrey v. United States, 573 F. Supp. 283 (D. La. 1983).....23, 26

California ex rel. State Lands Commission v. United States, 457 U.S. 273, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982)..... 15

Cinque Bambini Partnership v. State, 491 So.2d 508 (Miss. 1986), aff'd sub nom. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988)..... 15

TABLE OF AUTHORITIES – Continued

Page

Corp. of Presiding Bishops of the Church of Jesus Christ of the Latter-Day Saints v. Hodel, 637 F.Supp. 1398 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988) 21

Dickson v. Board of Commissioners of Caddo Levee District, 26 So. 2d 464 (La. 1946)..... 5

Edmiston v. Woods, 566 So.2d 673 (La. App. 2d Cir. 1990)..... 23

Eldridge v. Trezevant, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490 (1896)..... 5, 16, 17, 18

General Box Co. v. United States, 351 U.S. 159, 76 S.Ct. 728, 100 L.Ed.2d 1502 (1956) 6, 16

Gibson v. United States, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996 (1897)..... 18

Gollatte v. Harrell, 731 F.Supp. 453 (S.D. Ala. 1989) ..20, 29

Hayes v. Arkansas, 496 S.W.2d 372 (Ark. 1973) 24

Heckman Ranches, Inc. v. Idaho, 99 Idaho 993, 589 P.2d 540 (1979)..... 23

Howard v. Ingersoll, 54 U.S. (13 How.) 381, 14 L.Ed. 189 (1851)..... 22, 23, 24, 25

In re Matter of Devil's Lake, 423 N.W.2d 141 (N.D. 1988)..... 23

J. P. Furlong Enterprises, Inc. v. Sun Exploration and Prod. Co., 423 N.W.2d 130 (N.D. 1988) 12

Kelly's Creek & Northwestern R. R. Co. v. United States, 100 Ct. Cl. 396 (1943)..... 27

TABLE OF AUTHORITIES – Continued

Page

Lake Providence Port Com'n v. Bunge Corporation, 193 So.2d 363 (La. App. 2d Cir. 1966), *writ denied*, 195 So.2d 147 (1967) 16

McCormick Oil & Gas Corp. v. Dow Chemical Co., 489 So.2d 1047 (La. App. 1st Cir. 1986) 13

Mobil Oil Corporation v. Coast Petroleum Co., 671 F.2d 419 (11th Cir. 1982), *cert. denied*, 459 U.S. 970, 103 S.Ct. 300, 74 L.Ed. 2d 281 (1982) 15

Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) 12

Municipality No. 2 v. Orleans Cotton Press, 18 La. 122 (1841) 16

Oklahoma v. Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1922) 12

Oklahoma v. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1923) 12, 22, 25

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977) ..... *passim*

Parish of Jefferson v. Universal Fleeting Co., 234 So.2d 88 (La. App. 4th Cir. 1970) 16

Peterson v. Morton, 465 F. Supp. 986 (Nev. 1979), *rev'd on other grounds*, 666 F.2d 361 (9th Cir. 1982) 23

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988) 15

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845) 12

Ramsey River Road Property Owners v. Reeves, 396 So.2d 873 (La. 1981) 13

TABLE OF AUTHORITIES – Continued

Page

Shivley v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed.2d 331, 352 (1894) 13

Siebert v. Conservation Commission of Louisiana, 181 La. 237, 159 So. 375 (1935) 23

Sotomura v. Hawaii County, 460 F.Supp. 473 (D. Hawaii 1978) 21

South Dakota Wildlife Federation v. Water Management Board, 382 N.W.2d 26 (S.D. 1986) 23

State v. Barras, 615 So.2d 285 (La. 1993) 25

State v. Cockrell, 162 So.2d 361 (La. App. 1st Cir. 1964), *writ denied*, 164 So.2d 350 (La. 1964) 23

State v. Placid Oil Company, 300 So.2d 154 (La. 1974), *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784 (1975) 28

State v. Richardson, 140 La. 329, 72 So. 984 (1916) ...10, 23

Tenneco Oil Co. v. Board of Commissioners of the Lake Borgne Levee District, 567 So.2d 113 (La. App. 4th Cir. 1990), *writ denied*, 569 So. 2d 989 (La. 1990) 19

Terrebonne v. South Lafourche Tidal Control Levee District, 445 So.2d 1221 (La. 1984) 6, 18

Theisen v. Gulf, F. & A. Ry. Co., 78 So. 491 (Fla. 1917) 13

United States v. Cameron, 466 F. Supp. 1099 (D.C. Fla. 1978) 22, 23

United States v. Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064 (1941) 18

United States v. Claridge, 279 F. Supp. 87 (D. Ariz. 1967), *affirmed*, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961, 90 S.Ct. 994, 25 L.Ed.2d 253 (1970) 26

TABLE OF AUTHORITIES – Continued

Page

United States v. Harrell, 926 F.2d 1036 (11th Cir. 1991) 26

United States v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950) 12, 20

United States v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991) 25, 26

United States v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967) 18, 20

United States v. Virginia Electric and Power Co., 365 U.S. 624, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961) 18, 20

United States v. Willow River Power Co., 324 U.S.499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945) 12, 20

Utah Division of State Lands v. United States, 482 U.S. 193, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987) 11

Vieux Carre Property Owners v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020, 110 S.Ct. 720, 107 L.Ed.2d 739 (1990) 23

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) 16

Wemple v. Eastham, 150 La. 247, 90 So. 637 (1922) 22, 28

Williams v. Adkinson, 792 F.Supp. 755 (M.D. Ala. 1992), *affirmed*, 987 F.2d 774 (11th Cir. 1993) 21

Willis v. United States, 50 F.Supp. 99 (W. Va. 1943) 27

Wisconsin v. Trudeau, 139 Wisc. 2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988) 23

Yee v. Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 1532 (1992) 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Code Civil (1804), article 650 17

La. Civ. Code (1825), article 448 25

La. Civ. Code (1870), article 457 25

La. Civ. Code (1978), article 456 ..... 13, 25, 28

La. Civ. Code (1978), article 499 28

La. Civ. Code (1978), article 665 3

La. Const. (1974), Article 6, Section 42 ..... 3, 5, 18

La. R.S. 38:301 ..... 6, 18, 19

28 U.S.C. § 1257(a) 2

U.S. Const., Fifth Amendment ..... *passim*

U.S. Const., Fourteenth Amendment ..... *passim*

OTHER

1 *Corp. Jur. Civ.* 831, *lib.* 43, *tit.* 12 §§ 2 and 5 24

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A. N. Yiannopoulos, 2 *Louisiana Civil Law Treatise – Property* (3rd Ed. 1991) 9, 25

A. N. Yiannopoulos, 4 *Civil Law Treatise – Predial Servitudes* (La. State Law Inst. 1983) 18

Curia Philippica, 2.3.1 24

In re Land in New Orleans, Called the Batture, 17 Amer. St. Papers 91 (1810) 24

TABLE OF AUTHORITIES – Continued

Page

Las Siete Partidas 17

Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 Land and Water Law Rev. 1 (1978) 21

Patton on Land Titles (2d ed. 1957 and Supp.) 12

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Respondent.

Petition For A Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and order denying rehearing of the Louisiana Supreme Court entered on July 2, 1993 and September 2, 1993, respectively.

OPINIONS BELOW

The Judgment and Reasons for Judgment of the Twenty-Fifth Judicial District Court, Parish of

Plaquemines, State of Louisiana, dated July 8, 1991, and June 26, 1991, respectively, are unreported and are reprinted as Appendices "B" and "C," *infra.*

The Opinion of the Louisiana Fourth Circuit Court of Appeal dated November 13, 1992, is reported at 608 So.2d 1100, and is reprinted as Appendix "D," *infra.*

The Opinion of the Louisiana Supreme Court dated July 2, 1993, is reported at 621 So.2d 602, and is reprinted as Appendix "A," *infra.* The order of the Louisiana Supreme Court dated September 2, 1993, denying rehearing is reprinted as Appendix "E," *infra.*

STATEMENT OF JURISDICTION

The opinion of the Louisiana Supreme Court was entered on July 2, 1993. A timely Application for Rehearing was filed, and was denied on September 2, 1993. The time in which this Petition may be filed therefore extends to and includes December 1, 1993, and this Petition is timely. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the U.S. provides in pertinent part:

> [No State shall] deprive any person of . . . property without due process of law.

Article 6, Section 42 of the Louisiana Constitution provides as follows:

> (A) Compensation. Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law. However, nothing contained in this Paragraph with respect to compensation for lands and improvements shall apply to batture or to property the control of which is vested in the state or any political subdivision for the purpose of commerce. If the district has no other funds or resources from which the payment can be made, it shall levy on all taxable property within the district a tax sufficient to pay for property used or destroyed to be used solely in the district where collected.
>
> (B) Appropriation. Nothing in this Section shall prevent the appropriation of such property before payment.

Section 301(C)(1)(a) of Title 38 of the Louisiana Revised Statutes provides in pertinent part:

> All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

Louisiana Civil Code article 665 provides:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

All that relates to this kind of servitude is determined by laws or particular regulations.

STATEMENT OF THE CASE

The question presented by this case arises in the context of 48.6 acres of land owned by petitioners (the "Landowners") lying between the Mississippi River (the "River") levee and the River that were destroyed without compensation by the Plaquemines Parish Government ("PPG") to supply borrow material to the Army Corps of Engineers ("Corps") for two levee projects. The land in question, called "Shingle Point," is located at a sharp bend in the river called English Turn in Plaquemines Parish, Louisiana, on the east bank of the River south of New Orleans. Prior to the taking, the land had been used for agriculture, including grazing and growing crops, and was covered with pecan, oak and other mesic or dry-footed trees and vegetation. *See* III R 61-77; Plaintiffs' Exhibit 1. This land was protected from inundation for most or all of the year by a ridge of natural levee that ringed the entire point between the River and the artificial levee. *See* IV R 22-23; III R 163-164; III R 173. The property sloped up from the River, past the ordinary high water mark elevation of approximately 8.5 feet to elevations between 9 to 11 feet at the crest of the natural levee, and then gradually sloped down hundreds of feet to elevations of 7 to 8 feet along the riverside toe of the artificial levee. *See* Plaintiffs' Trial Exhibit 7. *See also* Joint Trial Exhibits 11-12; V R 232. On the protected or "land" side, the land gradually sloped further downward into the marsh lands of the tidewaters of the Gulf of Mexico. VII R 18-19. Thus, the Landowners' property, lying between the artificial levee and the River's bed, was the highest land in the vicinity, and was much higher in elevation than the land on the protected side of the levee.

This is no longer the case. The PPG adopted resolutions dated March 3, 1982, July 28, 1982 and June 15, 1988,

wherein the lands were "appropriated" for the purpose of removing fill dirt to be used for levee improvements. *See* 40-a, *infra*. Work on one project was completed in December of 1984, and for another in December of 1988. Joint Exhibits 16 and 17. The Landowners' property now consists of a series of approximately ten foot deep pits which are almost continuously inundated with the natural flow as well as the annual overflow of the River because the natural levee between the pits and the bed of the River has been deliberately cut away by the digging of accretion ditches.

No compensation was offered, much less paid, for either taking. Instead, the PPG invoked an ancient Louisiana doctrine that authorized the "appropriation" (taking without payment) of riparian lands for levee purposes as an exercise of a levee servitude that burdened all riparian lands, including the river's "batture." Article 665 of Louisiana's Civil Code provides that a servitude is imposed on the shores of navigable rivers for the making and repairing of levees. Louisiana courts had held the State owed no compensation for the exercise of this servitude, and that anything paid to the landowner for use of his or her land was a mere "gratuity." *See generally Dickson v. Board of Commissioners of Caddo Levee District*, 26 So. 2d 464, 478 (La. 1946), for a history of the Article 665 servitude. This Court approved such takings without the payment of just compensation in *Eldridge v. Trezevant*, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490 (1896), on the theory that such lands were burdened with this servitude prior to the time they were separated from the public domain, and were thus never free of the encumbrance after passing into private hands.

However, the Louisiana Constitution of 1974 abolished such "appropriations" of riparian land for levee purposes, and provided that all such takings were to be paid for "as provided by law." *See* La. Const. (1974), art. 6, § 42, at 3, *supra*. Shortly thereafter, the Louisiana legislature declared that owners of riparian lands taken for

levee purposes would be paid just compensation "to the full extent of their loss." *See* La. R. S. 38:301, at 3, *supra*. These statutes were "the legislative attempt to effectuate Article 6, Section 42 by providing fair market value to owners of riparian property." *Terrebonne v. South Lafourche Tidal Control Levee District*, 445 So.2d 1221, 1223 n.6 (La. 1984). The only exception to the just compensation requirement was for "batture," which continued to be exempt from the requirement of just compensation. Thus, there is no longer any levee servitude over non-batture riparian lands. *See* the discussion at 18-19, *infra*.

The Landowners filed the instant action for compensation, and expressly invoked the just compensation and due process provisions of the Louisiana Constitution, as well as the Fifth and Fourteenth Amendments to the United States Constitution. *See* Appendix F. Not surprisingly, the PPG's only defense was to claim that the land was "batture" and therefore could be "appropriated" without payment under Louisiana's ancient riparian servitude.

Both parties accepted this Court's definition of batture as that land lying between the ordinary high and ordinary low water marks of a river. *See General Box Co. v. United States*, 351 U.S. 159, 160 n. 1, 76 S.Ct. 728, 730 n. 1, 100 L.Ed. 1502 (1956), citing *Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners*, 160 La. 727, 1107 So. 506, 508 (1925). Thus, the trial of this case focused on each party attempting to demonstrate the location of the ordinary high water mark (top of the common law "bed" of the river) at Shingle Point.

In order to prove that the property taken from them was *above* the "ordinary high water", the Landowners called three expert witnesses to locate the physical signs of the "ordinary high water mark" of the Mississippi

River at Shingle Point.[1] These signs were found in the soil by a sedimentologist, in the vegetation by a botanist, and in the contour of the shore by a hydrologist. Soil changes, vegetation variations, and often visible escarping or cutting into the natural contours of the shore caused by the action of the stream occur at the limit of ordinary high water. All three experts working with different resources found a natural ridge or escarpment, confirmed by soil and vegetation evidence, to be physically present on Shingle Point at an elevation of approximately 8.5 feet, well *below* the elevation of all property taken from the Landowners. This fact demonstrated that the Landowners' property was *above* "ordinary high water," therefore "not batture," and thus subject to just compensation for its taking.

The PPG's experts ignored the land's physical evidence, presumably because this evidence is unassailable. Instead, they turned to the Corps' river flood-stage data, selected the River's highest peak each year, even if for only a single day, for a period of ten years, and then averaged those highest peaks. Not surprisingly, this mathematical calculation produced a number (11 feet) which was well *above* the land at issue and all other lands in lower Plaquemines, inside or outside the Corps' levee. Under the PPG's approach, defining "ordinary high water" as the average of annual peak flow, the Landowners' land is below ordinary high water, is batture, and is therefore exempt from the requirement of just compensation.

The Louisiana courts below accepted the PPG's definition of "ordinary high water" as equivalent to "average annual peak flow." While noting that the Landowners' evidence was "not without merit in fixing the limits of

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[1] Louisiana jurisprudence had never recognized any method of fixing the ordinary high-water mark except by physical determinations through lay testimony. *See* notes 9 and 14, *infra*.

the river's action on its bank by use of bank profiles and vegetation studies" (48-a, *infra*), the district court ultimately agreed with the PPG. The Landowners had argued to the district court that the Constitution constrained Louisiana from redefining "ordinary high water" in a manner different from United States precedent. *See* Appendix G. The district court rejected this assertion, without addressing the constitutional question, by simply noting the following:

> The foundation of plaintiffs' argument is centered more on federal regulations and jurisprudence, whereas the defendant's argument is primarily based on how the term is employed in Louisiana cases. The court will agree with the PPG's assertion that the federal regulations define river bed and ordinary high water with respect to the federal government's navigational servitude which is different from the Louisiana cases which deal with the public's 665 servitude and the rights of the riparian landowners.

47-a to 48-a, *infra*.

The intermediate appellate court affirmed, treating the entire question as merely one of "fact," and finding no "manifest error," which is the standard of review applicable to factual findings. *See* 71-a, *infra*. The court dismissed the Landowners' federal contentions (*see* Appendix H) without comment.

The Louisiana Supreme Court affirmed. After an exhaustive attempt to reconcile three lines of cases which have defined "batture" in three different ways depending

upon the issue at hand,[2] the Louisiana Supreme Court concluded what all of the parties conceded: "batture" for riparian servitude purposes is that land which lies between the ordinary high and ordinary low water marks of a river. *See* 16a to 20-a, *infra*. Thus, the only real issue was how and where to locate "ordinary high water."

The federal issue in this case arises from the manner and methodology by which the Louisiana Supreme Court defined "ordinary high water," and the constitutional offenses resulting from that definition. The Landowners argued that the court should apply the well-established precedents in this and every court which has considered the issue, as is required by both the Equal Footing Doctrine and the Fifth and Fourteenth Amendments. *See* Appendix H. The Louisiana Supreme Court rejected this contention:

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[2] Louisiana's preeminent property authority, and the redactor of its Civil Code's title on property, Professor A.N. Yiannopoulos, has observed the following:

> A study of Louisiana legal texts and jurisprudence leads to the conclusion that batture has three meanings. In the first sense batture refers to lands of alluvial origin, formed by imperceptible deposits of material or by receding waters on the banks of a river; it has the same meaning as accretion. In the second sense, the word batture refers to land formed in the bed of a river, that is, in an area below the ordinary low water mark. In the third sense, the word batture is used to denote the natural bank of a river, that is, the area between the ordinary low and ordinary high stage of the water.

A. N. Yiannopoulos, 2 *Louisiana Civil Law Treatise -- Property*, § 89 at 193 (3d ed. 1991). The definition to be used depended entirely upon the purpose for its employment. *Id.* at 192-93. But, "[f]or purposes of [the riparian levee servitude], the Louisiana Supreme Court has consistently defined batture as the area between ordinary low and ordinary high stage of the water of a navigable river." *Id.* at 194.

> **The laws and jurisprudence of France, our sister states, and the United States are irrelevant to the quest for the meaning of ordinary high water** in relation to the levee servitude and the rights of riparian landowners in Louisiana. *State v. Richardson*, 72 So. at 987. The phrase must be construed in the context of the nature of batture and the history and purpose of Louisiana's batture exemption. Therefore, contrary to plaintiffs' contentions, **Louisiana is not bound to indiscriminately follow a federal or common law definition of ordinary high water** which has no connection to our definition of batture, the levee servitude or riparian landowner rights, as set forth in our Constitution, legislation and jurisprudence.

24-a to 25-a, *infra* (emphasis added).

Rejecting all precedents on the subject, from Louisiana and elsewhere, the Louisiana high court then redefined the concept of "ordinary high water" as follows:

> Ordinary high water, then, is the **highest water stage** the river can be *expected* to reach annually, but not the level the water reaches during major flood events, i.e., reaches "on several occasions in periods of extraordinary high water during the last half of the century."

21-a to 22-a, *infra* (italics in original; additional emphasis added). More importantly, from both a legal and practical standpoint, was the court's pronouncement of the method by which "ordinary high water" is to be henceforth determined: "mean high water" or "the average of annual river stage peaks at a given location." 25-a to 26-a, *infra*.

Finding that the Landowners' land was almost entirely below "mean high water," as evidenced by river

stage gauge readings taken by the Corps over a number of years, the Court pronounced the Landowners' land "batture," and subject to mere "appropriation" without the payment of just compensation under the Louisiana Constitution. 28-a, *infra*. No mention was made of the United States Constitution, including its Equal Footing Doctrine or the Fifth and Fourteenth Amendments. *Id.*

The Landowners applied for rehearing, rearguing *inter alia* their contention that the court was not free to disregard to this Court's definition of "ordinary high water" or the United States Constitution's guarantee of just compensation. *See* 96-a to 99-a, *infra*. This request was denied by a vote of four to three. *See* 73-a, *infra*.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. LOUISIANA IS NOT FREE TO DEPART FROM THE FEDERAL DEFINITION OF "ORDINARY HIGH WATER."

A. The Equal Footing Doctrine constrains Louisiana from redefining "ordinary high water" to include more than the common law bed of a river.

Following the Revolution, the original Colonies succeeded to the British Crown's title and interest in the beds of the navigable waters within their respective borders. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 195-96, 107 S.Ct. 2318, 2320-21, 96 L.Ed.2d 162 (1987); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 317-18, 94 S.Ct. 517, 522, 38 L.Ed.2d 526 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977). After the ratification of the Constitution, new States were admitted to the Union with "the same rights, sovereignty and jurisdiction . . . as the original States

possess[ed] within their respective borders." 414 U.S. at 318, 94 S.Ct. at 522. *See also Oklahoma v. Texas*, 258 U.S. 574, 583, 42 S.Ct. 406, 410, 66 L.Ed. 771 (1922). Accordingly, title to the lands beneath the navigable waters was held in trust by the federal government "for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established states." *Montana v. United States*, 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981). The Equal Footing Doctrine finds its source in the Constitution itself. *See Oregon ex rel. State Land Board v. Corvallis, supra*, 429 U.S. at 374, 97 S.Ct. at 589; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845).

Under the Equal Footing Doctrine, as a matter of constitutional law, the States received all lands comprising the "bed" of the navigable rivers and streams, which constitutes that area from ordinary high water to ordinary high water. "The ordinary high water mark has been accepted as the limit of the bed of a stream." *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 805, 70 S.Ct. 885, 889, 94 L.Ed. 1277 (1950). "The ordinary high water mark bounds the bed of the river," *United States v. Willow River Power Co.*, 324 U.S. 499, 509, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945), and is in fact coterminous with the outer limit of the bed. *Oklahoma v. Texas*, 260 U.S. 606, 631-32, 43 S.Ct. 221, 225, 67 L.Ed. 428 (1923). *See e.g., 101 Ranch v. United States*, 714 F.Supp. 1005, 1013 (D.N.D.), *aff'd*, 905 F.2d 180 (8th Cir. 1990) ("[A] state acquires, as an incident of statehood, title to the beds of all navigable bodies of water within its boundaries, up to the ordinary high water mark of those bodies.").

"Several states have limited their ownership of the beds of navigable waters to the area below the low water mark. *See* 1 *Patton on Land Titles*, §§ 138 and 297 (2d ed. 1957 and Supp.)." *J. P. Furlong Enterprises, Inc. v. Sun Exploration and Prod. Co.*, 423 N.W.2d 130, 132 n.1 (N.D.

1988).[3] Louisiana is among them. It has ceded back to its riparian owners that area between ordinary low and ordinary high, retaining title only to the area between the ordinary low water marks. *See Ramsey River Road Property Owners v. Reeves*, 396 So.2d 873, 875 and n.2 (La. 1981); *McCormick Oil & Gas Corp. v. Dow Chemical Co.*, 489 So.2d 1047, 1049 (La. App. 1st Cir. 1986). The "bed" of the river, in Louisiana parlance, is confined to the area owned by the state – that which is below ordinary *low* water. The area between ordinary low and ordinary high water – the batture – is called the "bank." *See* La. Civ. Code (1978) art. 456; 46-a, *infra* (batture has same definition as "natural bank" of a river).

The varying treatments by States of the area between the ordinary high water marks of a river or stream have no Equal Footing Doctrine implications. As this Court has held, "[t]he title and rights of riparian or littoral proprietors in the soil below [the] high water mark . . . are governed by the laws of the several states." *Oregon ex rel State Land Board v. Corvallis, supra*, 429 U.S. at 376, 97 S.Ct. at 589, *citing Shivley v. Bowlby*, 152 U.S. 1, 57-58, 14 S.Ct. 548, 569, 38 L.Ed.2d 331, 352 (1894). In so holding, this Court overruled its earlier decision in *Bonelli Cattle Company v. Arizona, supra*, by recognizing that it erred in holding that federal law should control the "effect of a movement of the river (such as accretion, dereliction, etc.) upon title to the riverbed." 429 U.S. at 271, 97 S.Ct. at 587.

> Once the equal footing doctrine had vested title to the riverbed in Arizona as of the time of its admission, the force of that doctrine was spent; it did not operate after that date to determine

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[3] Even in states where alteration of ownership rights has occurred in favor of private citizens, "ordinary high water" is the term used to denote the upper boundary of original state sovereignty. *See, e.g., Theisen v. Gulf, F. & A. Ry. Co.*, 78 So. 491, 500 (Fla. 1917).

> what effect on titles the movement of the river might have.

Id.

However, any attempt by a state to deviate from the federal definition of "ordinary high water," and thus unilaterally expand the area originally received by it as a consequence of its equal footing, gravely offends the Equal Footing Doctrine, and thus the Constitution. This is true because federal, not state, law controls the question of the extent of the lands originally granted to each state upon its admission to the Union. In *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935), this Court held that federal, not state, law determined the boundary between upland and tideland areas in Los Angeles Harbor. *Borax* not only survives this Court's *Corvallis* re-examination of the question, but was expanded in scope to include questions involving the boundaries of navigable rivers and streams:

> [The *Borax* rule] would require that determination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands likewise be decided as a matter of federal law rather than state law.

429 U.S. at 377, 97 S.Ct. at 590. *See also*, 429 U.S. at 370, 97 S.Ct. at 587 (federal law "fixes the initial boundary line between fast lands and the river beds [the ordinary high water mark]."); 429 U.S. at 384, 97 S.Ct. at 594, Marshall, J. dissenting ("The Court holds that federal law governs only the determination of the initial boundaries of the grant. . . . ").[4] Thus, in cases where the location of the

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[4] The same issue was recently raised in connection with a dispute over the Mississippi tidelands. In deciding whether Mississippi has been granted only those areas that are actually

ordinary high water mark is a "condition precedent" to the subsequent state law determination of whether the land in question passed into private hands, federal law controls. *Mobil Oil Corporation v. Coast Petroleum Co.*, 671 F.2d 419, 423 (11th Cir. 1982), *cert. denied*, 459 U.S. 970, 103 S.Ct. 300, 74 L.Ed. 2d 281 (1982). Since, as explained below, Louisiana no longer enjoys a levee servitude over any area that was not granted to it under the Equal Footing Doctrine, the question of the extent of Louisiana's initial sovereign lands is squarely raised in this case.

B. The Fifth Amendment, applicable to the States through the Fourteenth Amendment, constrains Louisiana from redefining "ordinary high water" to include more than the common law bed of a river.

The Fifth Amendment's Takings Clause prohibits the government from depriving an owner of his or her property without the payment of just compensation. This prohibition has been made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

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navigable, or whether it had received all areas affected by the ebb and flow of the tide, the courts focused exclusively on federal law. "[T]he question of what lands were given to the state in trust [under equal footing] is necessarily a question of federal law." *Cinque Bambini Partnership v. State*, 491 So.2d 508, 513 (Miss. 1986), citing *Borax Consolidated, Ltd. v. City of Los Angeles, supra*, 286 U.S. at 26, 56 S.Ct. at 29; *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 285 n.14, 102 S.Ct. 2432, 2440 n.14, 73 L.Ed.2d 1, 12 n. 14 (1982); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. at 373, 97 S.Ct. at 588. This Court affirmed that decision, relying exclusively on federal law without even feeling the need to discuss the choice of law question. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988).

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980).[5]

Nonetheless, this Court in *Eldridge v. Trezevant, supra*, held that the taking of land for levee purposes in Louisiana was exempt from the Takings Clause.[6] The rationale was that the levee servitude constituted nothing more than a pre-existing encumbrance on lands that had attached prior to the time the lands became subject to private ownership, and that passed along with the land when it left the public domain. A levee "taking" was

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[5] There is little doubt that the extraction of dirt from the Landowners' property for borrow purposes constitutes a "taking" under the Fifth Amendment. "Where the government authorizes a physical occupation of property or actually takes title, the Takings Clause generally requires compensation." *Yee v. Escondido*, ___ U.S. ___, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 1532 (1992).

Nor is there any question that the land destroyed by the respondent, and the dirt confiscated by it, constitutes "property" under Louisiana law. Even the batture is owned by the riparian landowner, *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122 (1841), and he or she is entitled to its use in any manner that does not interfere with the purposes of navigation and commerce. *See Lake Providence Port Com'n v. Bunge Corporation*, 193 So.2d 363, 368 (La. App. 2d Cir. 1966), *writ denied*, 195 So.2d 147 (1967). *See also* 47-a to 48-a, *infra; Parish of Jefferson v. Universal Fleeting Co.*, 234 So.2d 88, 91 (La. App. 4th Cir. 1970).

[6] *General Box Co. v. United States, supra*, might contain some indication of this Court's realization that *Eldridge* was due for reexamination. Certiorari was granted in that case to consider whether the destruction of trees located on batture without prior notice to the owner offended the Fourteenth Amendment. This Court decided that it did not. However, it expressly noted that the petitioner had not asked for a reexamination of *Eldridge* and its progeny. *See* 351 U.S. at 7167 n.17, 76 S.Ct. at 734 n. 17.

simply an exercise of that servitude.[7] This is exactly the same theory that this Court has invoked to exempt uses of the federal navigational servitude from the Takings Clause.

> The proper exercise of [the power to regulate the navigable waters reserved to the United States under the Commerce Clause] is not an invasion of any private property rights in the

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[7] With all due respect, *Eldridge v. Trezevant*, *supra*, rests upon an absolutely incorrect premise: that the land that Louisiana claimed to be subject to its levee servitude had passed through either the United State's and/or Louisiana's hands such that a public servitude could permanently attach to the property before it was transferred by the government to private citizens. However, as much as 85% of the riparian lands in the State of Louisiana on the Mississippi River were the subject of direct land grants from the Spanish and French Crowns, prior to the Louisiana Purchase. Neither the United States nor Louisiana was interposed in the chain of title to these lands. Under Article 3 of the Treaty of Paris of April 30, 1803, private landowners were "maintained and protected in the free enjoyment of their liberty, property and religion." An examination of *Las Siete Partidas* reveals that no levee servitude existed under Spanish Law prior to Spain's loss of Louisiana. In France, the closest equivalent is Article 650 of the 1804 *Code Civil*, which only reserved a servitude for a "footpath along navigable or floatable rivers." While at least some of the concessions from the crowns of France and Spain may have themselves required construction of levees by riparian owners, none of these concessions imposed a levee servitude. These burdens amounted to no more than a resolutory condition – that the lands would revert back to the crown should the riparian owner fail to build a levee to protect the land from inundation, usually within a three year period. Since nothing even remotely equivalent to the levee servitude approved in *Eldridge v. Trezevant* was imposed by either the Spanish or French Sovereign, riparian lands passed free and clear into private hands, and any subsequent "takings," such as by imposition of a levee servitude, should have been subject to the Takings Clause.

> stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

United States v. Rands, 389 U.S. 121, 123, 88 S.Ct. 265, 267, 19 L.Ed.2d 329 (1967), *citing United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596-97, 61 S.Ct. 772, 775, 85 L.Ed. 1064 (1941), and *Gibson v. United States*, 166 U.S. 269, 275-76, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). *See also United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 628, 81 S.Ct. 784, 788, 5 L.Ed.2d 838 (1961).

Louisianians acted in their 1974 Constitution to overrule *Eldridge v. Trezevant, supra*, its progeny, and former Louisiana legislation and jurisprudence, by eliminating the levee servitude over all lands except those to which it could be constitutionally and justifiably applied – lands between the ordinary high water marks of navigable rivers and streams, or those lands that Louisiana received upon admission to the Union under the Equal Footing Doctrine. Article 6, Section 42 of the 1974 Louisiana Constitution specified that lands taken for levee purposes *would* be paid for "as provided by law." The Louisiana legislature responded, and provided that all lands taken for levee purposes would be paid for at fair market value, to the full extent of the loss. *See Terrebonne v. South Lafourche Tidal Control Levee District*, 445 So.2d 1221, 1223 n.6 (La. 1984). This continues to be the law today. *See* La. R.S. 38:301(C)(1)(a) ("All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.").

Thus, mere "appropriation" without payment for levee purposes is no longer constitutional. A. N. Yiannopoulos *4 Civil Law Treatise – Predial Servitudes* at 81 (La.

State Law Inst. 1983). "Appropriation" without compensation of anything except "batture" has been illegal in Louisiana since 1974. *See Tenneco Oil Co. v. Board of Commissioners of the Lake Borgne Levee District*, 567 So.2d 113, 116 n.8 (La. App. 4th Cir. 1990), *writ denied*, 569 So. 2d 989 (La. 1990) ("Thus, the constitution and R.S. 38:301 requires [sic] payment at fair market value for that portion of the bank taken which is *not* batture."). As the Louisiana Supreme Court stated in its opinion below:

> Implementing the 1974 constitutional provision, the legislature increased compensation from "assessed value" to "fair market value to the full extent of the loss" for the actual taking of improvements and all lands *"exclusive of batture."* (emphasis added).
>
> Thus, while significant changes occurred in compensating riparian landowners for lands and improvements appropriated pursuant to the levee servitude, the batture exemption from compensation remained constant.

14-a to 15-a, *infra* (italics in original; citations omitted).

The "batture" exemption is justifiable because Louisiana can legitimately claim a pre-existing right that burdens these lands. "Batture," being below ordinary high water, was granted outright to Louisiana under the Equal Footing Doctrine as part of the "bed." Thus, federal law would not be concerned with the State's treatment of "batture." *See Oregon ex rel. State Land Board v. Corvallis, supra.*

This is not so, however, for land above ordinary high water. This land was never owned by Louisiana, but was "public" land granted to private owners directly by the federal government. Louisiana can not lay claim to lands above ordinary high water without satisfying the requirements of the Takings Clause, because it can not impose a servitude over lands it never owned.

Once again, the federal navigational servitude provides a useful analogy. "The navigational servitude of the United States does not extend beyond the high water mark. Consequently when fast lands are taken by the Government, just compensation must be paid." *United States v. Rands, supra,* 389 U.S. at 123, 88 S.Ct. at 267; *United States v. Virginia Electric and Power Co., supra,* 365 U.S. at 628, 81 S.Ct. at 788. This is particularly true when the federal government acts to cause lands which were previously high and dry to become below ordinary high water, such as by artificially raising the water level of a river or stream. *See e. g., United States v. Kansas City Life Ins. Co., supra; United States v. Willow River Power Co., supra.* This rule should have even greater force were the government to attempt to re-categorize fast lands by fiat through a redefinition of "ordinary high water."

The district court in *Gollatte v. Harrell,* 731 F.Supp. 453 (S.D. Ala. 1989), had no trouble reaching this conclusion in a case where the Corps of Engineers sought to include certain land within the reach of the navigational servitude by locating the "ordinary high water" of the Tombigbee River by examination of statistics regarding historical flow levels.

> The United States in this case simply attempts to expand the lateral extent of the navigation servitude of the Tombigbee River, by extending the reach of the ordinary high water mark as it leaves the stream and its bed during times of flooding. The decisions of the Supreme Court make clear that the navigational servitude cannot be extended by such means.

731 F.Supp. at 460.

As will be demonstrated below, the Louisiana Supreme Court is attempting to do exactly that which was rebuked in *Gollatte,* expanding the lateral extent of "batture" in derogation of federal law. Moreover, it also redefines the ordinary high water with a more expansive

view than that taken in its own precedents. *See* notes 9 and 14, *supra*. The Takings Clause of the Fifth and Fourteenth Amendments will not tolerate either of these actions. This Court,

> in *dicta*, has indicated that a state court, like other state entities, may effect an unconstitutional taking if the court's decision causes an "unpredictable," "unforeseeable," or "sudden" change in the law that results in the transfer of private property to the state without due process of law, *see Bonelli Cattle Co v. Arizona*, 414 U.S. 313, 331, 94 S.Ct. 517, 528, 38 L.Ed.2d 526 (1973), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977); *Hughes v. Washington*, 389 U.S. 290, 297-98, 88 S.Ct. 438, 442-43, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring), or if the state court decision rests upon a "gross" or "arbitrary" error. *Roberts v. City of New York*, 295 U.S. 264, 277, 55 S.Ct. 689, 691, 79 L.Ed. 1429 (1935).

Williams v. Adkinson, 792 F.Supp. 755, 764 (M.D. Ala. 1992), *affirmed*, 987 F.2d 774 (11th Cir. 1993).[8]

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[8] *See also Corp. of Presiding Bishops of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 637 F.Supp. 1398, 1406 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988) ("In an appropriate case, it now appears that the United States Supreme Court today would probably vote with Mr. Justice Stewart['s concurring opinion in *Hughes*] in ruling that a taking of private property through a radical and retroactive change in state law, effected by judicial decision, is an unconstitutional taking."); *Sotomura v. Hawaii County*, 460 F.Supp. 473, 481-82 (D. Hawaii 1978), holding that an unconstitutional taking without compensation was accomplished by the Hawaii Supreme Court's "use of the highest wash of the waves as the monument fixing their

II. THE DECISION BELOW ADOPTS A DEFINITION OF "ORDINARY HIGH WATER" THAT IS IRRECONCILABLE WITH FEDERAL LAW

The term "ordinary high water" has no "immutable definition." *United States v. Cameron*, 466 F. Supp. 1099, 1110 (D.C. Fla. 1978). However, the ordinary high water stage of the water does inevitably leave its mark. *Id.* It is this "mark" that has been adopted as the very definition of "ordinary high water."

> T[he ordinary high water line] is to be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.

Howard v. Ingersoll, 54 U.S. (13 How.) 381, 427, 14 L.Ed. 189 (1851) (Curtis, J., concurring). This Court adopted the "mark" definition because under it, "no scientific exploration" was needed to find its location, which is that place "where the bank is fairly marked by the water, [and] water level will show at all places where the line is." 54 U.S. at 416, 419. *See also Oklahoma v. Texas, supra*, 260 U.S. at 632, 43 S.Ct. at 225 (The "bed" of a river (that below ordinary water) is the land which is "kept practically bare of vegetation by the wash of the waters of the river from year to year, in their onward course, although parts of it are left dry for months at a time.").[9]

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seaward boundary at high water mark, rather than the seaweed line" as previously employed.

[9] Up until now, *Howard v. Ingersoll, supra*, decided in 1851, has not been ignored in Louisiana, and has been cited twice with favor by the Louisiana Supreme Court, once in *Wemple v.*

While this Court has never had occasion to revisit the issue, lower courts have fleshed out the *Howard v. Ingersoll* definition. They have continually defined ordinary high water in terms of its mark, left by the continuous action of the river's ordinary high water. This mark constitutes a line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of the soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. *See Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 461 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020, 110 S.Ct. 720, 107 L.Ed.2d 739 (1990); *Borough of Ford City v. United States*, 345 F.2d 645, 648-51 (3rd Cir. 1965), *cert. denied*, 382 U.S. 902, 86 S.Ct. 236, 15 L.Ed.2d 156 (1965); *Buttrey v. United States*, 573 F. Supp. 283, 297 (E.D. La. 1983); *Peterson v. Morton*, 465 F. Supp. 986, 1002 (Nev. 1979), *rev'd on other grounds*, 666 F.2d 361 (9th Cir. 1982); *United States v. Cameron, supra*, 466 F. Supp. at 1111-12.[10]

Eastham, 150 La. 247, 90 So. 637, 638 (1922), and again in *State v. Richardson*, 140 La. 329, 72 So. 984, 990 (1916). Louisiana has previously located "ordinary high-water" by its physical mark. *See e.g., State v. Richardson, supra; Edmiston v. Woods*, 566 So.2d 673, 675-76 (La. App. 2d Cir. 1990). *Cf. A. K. Roy v. Board of Commissioners*, 238 La. 926, 117 So.2d 60 (1960); *Siebert v. Conservation Commission of Louisiana*, 181 La. 237, 159 So. 375, 377 (1935); *State v. Cockrell*, 162 So.2d 361, 377 (La. App. 1st Cir. 1964), *writ denied*, 164 So. 2d 350 (La. 1964).

[10] Not only federal courts, but all State courts have uniformly (until now) adopted the *Howard v. Ingersoll* approach. *See e.g., In re Matter of Devil's Lake*, 423 N.W.2d 141 (N.D. 1988); *Wisconsin v. Trudeau*, 139 Wisc. 2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988); *South Dakota Wildlife Federation v. Water Management Board*, 382 N.W.2d 26 (S.D. 1986); *Heckman Ranches, Inc. v. Idaho*, 99 Idaho 993, 589 P.2d 540 (1979); *Belmont v. Umpqua Sand & Gravel, Inc.*,

The "average annual peak" definition adopted by the Louisiana Supreme Court below is absolutely irreconcilable with *Howard v. Ingersoll*, and its monolithic progeny. This is so because the *only* two things considered under the Louisiana court's approach – peak flow and periodic inundation – are the very facts that *Howard* expressly states are anathema to the concept of "ordinary" high water. From the most ancient times, it has been recognized that the "bed" of a river (ordinary high water to ordinary high water) is that which contains the open flow of the channel, and the "bed" does not change on the basis of periodic or even annual "overflows" or "floods," where the peak waters rise up for a few short days or even weeks above the top of the natural bank and inundate the flood plains located beyond. This has been the definition of "bed" from ancient Roman times, a definition adopted in Spain and France.[11] This concept of "bed"

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373 Or. 581, 542 P.2d 884 (1975); *Hayes v. Arkansas*, 496 S.W.2d 372 (Ark. 1973); *Board of Trustees of Internal Imp. Trust Fund v. Walker Ranch General Partnership*, 496 So.2d 153 (Fla. App. 1986), *review denied*, 504 So.2d 766 (Fla. 1987).

[11] Roman law: "A bank properly defined is that which contains the river, in the natural course of its waters, but it does not change its banks when it is at times swelled either by showers or by the sea, or any other cause. . . . " 1 *Corp. Jur. Civ.* 831, *lib.* 43, *tit.* 12 §§ 2 and 5, quoted in *In re Land in New Orleans, Called the Batture*, 17 Amer. St. Papers 91 (1810). Spanish law: "The bank of a river is understood to be the whole of what contains its waters when most swelled, in whatsoever time of the year, without leaving its bed or channel." *Curia Philippica*, 2.3.1, quoted in *In re Land in New Orleans, Called the Batture, supra*. French law: "We have admitted, in conformity with the Roman law, that the boundaries of a river are determined by the usual high-water line, without overflowing." 2 Aubry & Rau, *Droit Civil Francais*, § 203 at 252 n.13 (La. St. Law Inst. Trans. 1966). *See also* 1 Planiol, *Treatise on the Civil Law*, no. 3070 at 813 (12th ed. 1939, La. St. Law Inst. Trans.) ("The limit of the banks of waterways . . . should be based upon 'the height of the water flowing freely before overflowing.' ").

and "ordinary high water" was adopted in the United States as well. As this Court stated in *Howard v. Ingersoll*:

> [The riverbed] neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range up, as natural or undisclosed pasture.

54 U.S. at 446. Thus, "[u]nder *Ingersoll*, lands periodically submerged but still useful for agricultural purposes are thus above the ordinary high water line." *United States v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1505-06 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 415, 116 L.Ed.2d 436 (1991). *See also Oklahoma v. Texas*, *supra*, 260 U.S. at 632, 43 S.Ct. at 225 ("[L]ateral valleys which have the characteristics of relatively fast land . . . although temporarily overflowed in exceptional instances when the river is at flood" are excluded from the "bed" of a river.). Therefore, ordinary high water is defined "without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." *Alabama v. Georgia*, 64 U.S. (23 How.) 505, 515, 16 L.Ed. 556 (1859).[12]

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[12] Louisiana follows the same rule, although it refers to the area as "bank" instead of "bed." Article 448 of the Civil Code of 1825 and article 457 of the Civil Code of 1870 provided in pertinent part the following:

> The banks of a river or stream are understood to be that which contains it in its ordinary state of high water; **for the nature of the banks does not change, although from some cause they may be overflowed for a time.**

(emphasis added). This rule was continued in article 456 of the 1978 revision to the Civil Code. Yiannopoulos, *supra*, at 153. *See State v. Barras*, 615 So.2d 285, 286 (La. 1993), decided only weeks

As a consequence, federal law "mandate[s] exclusion of annual spring floods in calculating the ordinary high water line." *United States v. Pend Oreille Public Utility Dist. No. 1, supra,* 926 F.2d at 1505. "The ordinary high water mark of a river . . . does not extend to peak flow or flood stage so as to include overflow on the flood plain . . . ," *United States v. Claridge,* 279 F. Supp. 87, 91 (D. Ariz. 1967), *affirmed,* 416 F.2d 933 (9th Cir. 1969), *cert. denied,* 397 U.S. 961, 90 S.Ct. 994, 25 L.Ed.2d 253 (1970), and it is a "mistaken assumption" to conclude that annual peaks determine the ordinary high water line of a river. 416 F.2d at 934. *See also United States v. Harrell,* 926 F.2d 1036, 1041 (11th Cir. 1991) ("Nor does a river's ordinary high water mark encompass the river's peak flow or flood stages."); *Buttrey v. United States, supra,* 574 F. Supp. at 298 ("[T]he courts have made clear that a river's ordinary high water mark does not encompass its peak flow or flood stages").

An average of the annual river stage peaks is a mathematical calculation of nothing more than the annual river overflows or floods that are the very antithesis of "ordinary" high water. As one court explained:

> The obvious result of applying the [averaging] method advocated by counsel for the Government would be to subject the property owner to the risk of permanent flood conditions; to require him to submit without compensation to a condition during every day in the year which in the ordinary course of nature occurs on but one day in the year. The rights of the Government cannot be so extended.

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before the Opinion below and holding that lands that were annually inundated for up to six months per year with overflow and flood waters were above the "bank" of the Atachafalaya River, which by definition places them above the "ordinary high-water mark."

Willis v. United States, 50 F.Supp. 99, 101 (W. Va. 1943) (emphasis added).[13] Thus, mathematical calculations of the ordinary high water mark of a river or stream have been consistently rejected when offered, even in Louisiana.[14] *See also Kelly's Creek & Northwestern R. R. Co. v. United States*, 100 Ct. Cl. 396 (1943), rejecting testimony regarding stage data as "wholly without value;" Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 Land and Water Law Rev. 1, 30 (1978) ("Use of [a statistical averaging process to determine ordinary high water] has in fact been declared to be reversible error.").[15]

Even the Louisiana courts in this case as they embrace averaging of peaks for determination of "ordinary high water" all but concede that their approach is totally contrary to prevailing law nationwide. However, they justify their departure on the ground of Louisiana's "unique" heritage. However, as explained above, there is nothing special or exceptional about Louisiana, at least

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[13] The court also gave as a secondary reason for rejecting the "averaging" approach the fact that statistics can be manipulated to satisfy the particular aim of the statistician. 50 F. Supp. at 100. Indeed, if *all* stages of water at Shingle Point above 7.20 from 1977 through 1990 had been averaged, instead of merely those selected by the PPG, the "ordinary high-water mark" would have been 9.08 feet, an elevation which would have made all of the Landowners' property fast land and safely above batture-level.

[14] "Previously, in cases involving the delimitation between bed and bank, th[e Louisiana Supreme Court] rejected methods involving arithmetical water level averaging and held that the testimony of the witnesses who lived in the vicinity is to be favored over such abstract mathematical measurements." 31-a, *infra*, Dennis, J., dissenting.

[15] Justice Dennis summarized additional "fallacies and frailties involved in arithmetical expert data" of ordinary high-water in his dissent in this case. *See* 32-a to 33-a, *infra*.

when it comes to the concept of "ordinary high water," that exempts it from the supremacy of federal law in this area.

III. LOUISIANA'S NEW DEFINITION OF "ORDINARY HIGH WATER" WILL ALLOW THE STATE TO CONFISCATE WITHOUT PAYMENT VAST AREAS OF LAND FOR A MULTITUDE OF PURPOSES

Classification of riparian land as "bank" has disastrous consequences for the owners of land in Louisiana. "The land lying between the ordinary low mark and the ordinary high water mark is called the bank of the stream and belongs to the owner of the adjacent land, subject to the use by the public." *State v. Placid Oil Company*, 300 So.2d 154, 157 (La. 1974), *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784 (1975), citing *Wemple v. Eastham, supra*, (emphasis added). *See also* La. Civ. Code art. (1978) 456 ("The banks of navigable rivers and streams are private things that are subject to public use."); La. Civ. Code (1978) art. 499 ("[T]he owner of the bank . . . is bound to leave public that portion of the bank which is required for the public use."). Accordingly, the Louisiana Supreme Court's decision below means that lands that have always been historically classified as private lands not subject to public use now become public because of the simple fact of periodic inundation by flood, overflow, or backwaters from rivers, streams, tributaries, or even man made canals.

This result is not confined to Shingle Point, Plaquemines Parish. Much of Louisiana is annually inundated with the overflow, backwaters, and flood waters of its navigable rivers. It is untenable to suggest that all of these areas are below "ordinary high water," as the Louisiana Supreme Court has done by its expansive definition.

> To accept the "definition" of OHWM advanced by [the Louisiana Supreme Court] in this case, is to recognize no horizontal limits to the "bed" of a navigable river in those areas where the banks are relatively low and flat as they are along [the southern most portion of the Mississippi, and most of Louisiana's southern rivers]. The consequences of any such rule, if applied to our navigable rivers and inland lakes, would be untenable. Any such definition of OHWM, as the line establishing the government's navigational [or levee] servitude, is simply not appropriate to inland freshwater rivers and lakes, which are subject to irregular period rises, causing them to overflow their natural banks. . . . [T]here must be horizontal limits to the "bed" of a navigable river; otherwise, the [government's rights] would extend in all directions to the lateral extent of the flood waters of any navigable river.

Gollatte v. Harrell, supra, 731 F.Supp. at 462. As demonstrated above, neither the Equal Footing Doctrine, nor the Takings Clause of the Fifth and Fourteenth Amendments will tolerate such a result.

CONCLUSION

The issue here is not concerned with a physical changing of the bed of a river by accretion, dereliction, natural or even artificial actions. This land has had a constant and consistent boundary between the bed of the river and the riparian land grants. The bed and banks have not changed. Thus, the non-federal question presented to this Court in *Bonelli Cattle Co. v. Arizona, supra* and *Oregon ex rel. State Land Board v. Corvallis, supra* is not pertinent to this issue. Here, the opinion of the highest Court of the State of Louisiana, disregarding (1) its law, (2) this Court's law on the separation of the bed of

navigable rivers granted to the State from riparian lands acquired by federal private grants and the method of ascertaining that original boundary at the ordinary high water mark and (3) the Constitutional mandate that just compensation must be paid for private lands taken by the government presents pressing landmark Federal questions that beg for consideration by this Court.

Respectfully submitted,

MACK E. BARHAM, Counsel of Record
ROBERT E. ARCENEAUX
MATTHEW K. BROWN
BARHAM & ARCENEAUX, A PLC
650 Poydras Street, Suite 2700
New Orleans, LA 70130
Telephone: (504) 525-4400

Attorneys for Petitioners

JUL 2 1993

APPENDIX "A"

SUPREME COURT OF LOUISIANA

No. 93-C-0167

WARREN DeSAMBOURG AND
MARY DeSAMBOURG

versus

BOARD OF COMMISSIONERS FOR THE
GRAND PRAIRIE LEVEE DISTRICT

ON WRIT OF CERTIORARI TO THE COURT OF
APPEAL, FOURTH CIRCUIT, PARISH OF
PLAQUEMINES, STATE OF LOUISIANA

ORTIQUE, Justice[1]

We granted writ to determine the meaning of "batture" as it is used in the context of the batture exemption from compensation for the state's appropriation of

Dennis J. dissents with reasons.

Watson J. dissents.

Lemon J. Concurs with Reasons.

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[1] Pursuant to Rule IV, Part 2, § 3, Marcus, J. was not on the panel which heard and decided this case. See footnote in *State v. Barras*, 615 So. 2d 285 (La. 1993).

riparian lands pursuant to its levee servitude.[2] Riparian landowners at Shingle Point filed eleven suits, which have been consolidated, against the Board of Commissioners for the Grand Prairie Levee District, now Plaquemines Parish Government ("PPG")[3] claiming fill dirt was appropriated from their lands without compensation. PPG denies liability claiming the landowners are not entitled to compensation because the appropriated fill

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[2] The Louisiana Constitution of 1974 exempts the state and its political subdivisions from compensating riparian landowners for the exercise of its levee servitude when the lands actually used or destroyed for levee or levee drainage purposes are "batture." LSA-Const. Art. 6, § 42. The constitutional provision is presently implemented in LSA-R.S. 38:301(C)(1)(a). For the text of those provisions, see notes 7 and 14, *infra.*

Appropriation is the taking of a servitude. A.N. Yiannopoulos, 2 La. Civil Law Treatise 3d (1991) § 88, n. 20 at p. 191. It is a mode for the state and its political subdivisions to exercise its levee servitude, whereby lands and improvements can be taken for levees purposes, before the payment of compensation. *See* LSA-Const. Art. 6, § 42 (A) and (B), at n. 7. The right of appropriation proceeds upon the principle "that the riparian owner enjoys his property *sub modo,* i.e., subject to the right of the public to reserve space enough for levees, public roads, and the like. Over this space, the front proprietor never acquires complete dominion. It never passes free of this reservation by deed to purchaser." *Ruch v. City of New Orleans,* 43 La. Ann. 275, 9 So. 473 (1891). Unlike expropriation, appropriation of riparian property does not vest title property in the state or its political subdivisions. *Delaune v. City of Kenner,* 550 So. 2d 1386 (La. App. 5th Cir. 1989), *writ den.,* 553 So. 2d 475 (La. 1989).

[3] LSA-Const. Art. 6, §§ 16 and 38 provide that levee districts can be reorganized, merged and consolidated with a parish. The Grand Prairie Levee District was consolidated and merged into the Parish of Plaquemines and the levee district ceased to exist as a separate entity.

dirt was batture taken for levee purposes and, therefore, exempt from compensation pursuant to LSA-Const. Art. 6, § 42 and LSA-R.S. 38:301(C)(1)(a). After a bench trial on the merits, the court determined all of Shingle Point is batture, found no compensation is due for the taking of the batture, and dismissed plaintiffs' suits. The court of appeal affirmed. 608 So. 2d 1100 (La. App. 4th Cir. 1992). In the context of the batture exemption from compensation, "batture" is alluvial accretions annually covered by "ordinary high water," the highest stage the river can be expected to reach annually in seasons of high water. Applying that precept to the factual findings of the trial court, we find no error in its conclusion that all of the land taken by PPG, pursuant to its levee servitude, was batture within the meaning of the constitutional exemption from compensation and, therefore, exempt from the payment of compensation.

I.

Shingle Point, near English Turn in Plaquemines Parish, is an area of approximately fifty acres. It lies between the Mississippi River and the levee on the river's left descending bank at River Mile 78. When the river is at its ordinary low stage, the distance between the toe of the levee and the water's edge is about 900 feet. It is wooded and composed of alluvion. Its artificial levee is 18.0 feet or more high and topped with concrete upwards from 8.3 feet. Borrow pits[4] had previously been excavated in the

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[4] A "borrow pit" is an excavated area where material has been dug for use as fill at another location. *Webster's New Collegiate Dictionary*, 150th Anniv. Ed. (1981). "Borrow" or "borrow material" refers to the fill dirt excavated from the borrow pit.

area. These consolidated suits concern borrow pit excavations for two levee projects involving approximately sixteen acres of Shingle Point.

The two levee improvement projects were initiated and supervised by the United States Army Corps of Engineers ("COE"). The COE specified the locations of the levee projects and the areas to be appropriated, including the appropriation of portions of Shingle Point for borrow pits.[5] Accordingly, in 1982 and 1983, a six acre area at the southern end of Shingle Point was appropriated by Plaquemines Parish Commission Council for the Grand Prairie Levee District for the Scarsdale-Stella Levee Set Back and Road Relocation Project, a project 2.1 miles from the borrow pit site. An additional ten acre area of Shingle Point was appropriated for excavation in 1986 through 1988 for the English Turn Levee Enlargement and Concrete Slope Pavement Project, a project adjacent to the borrow pit site. Both excavations involved the clearing of shrubs and trees and the removal of fill dirt or borrow material. The pit was located 100 feet from the toe of the levee and extended 700 feet across.

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[5] Pursuant to the Mississippi River Flood Control Act of 1928, 33 U.S.C. § 701-709, the COE oversees and maintains the Mississippi River and levee system. Once the COE selects a site for levee improvement, local governments like the PPG are obligated to furnish all needed rights of way and to appropriate the necessary riparian property. Nevertheless, neither the COE nor the United States government have an interest in this action. Moreover, the resolutions by the PPG, which authorized the appropriations of plaintiffs' lands, specifically state that the United States, its agents and employees are held blameless for any and all damages which may be caused by the levee construction and land appropriations.

Plaintiffs Warren and Mary DeSambourg, Albert and Rosalie Schell, Sadie, Joseph, JoAnn and Linda Perino, Charles and Angelina Mancuso, and Mary and Joseph Seibert, Jr., filed their suits in July and August, 1984, seeking damages for the fair market value of the property taken for the Scarsdale project, severance damages and attorneys fees. Plaintiffs Anthony and Marie LaGreco, Joseph LaGreco, Emile LaCreco, Salvadore DiCarlo, Henry Heier and Charles and Ina Miller, field their suits in 1987 seeking damages for the fair market value of the property taken for the English Turn Project, severance damages and attorney's fees.

PPG filed a motion for summary judgment, claiming all the property appropriated is batture and exempt from compensation. The trial court referred the motion to trial on the merits. At trial, after the plaintiffs presented their evidence and rested, the court granted summary judgment in the suit of Charles and Ina Miller because the levee servitude appropriated was not utilized, as borrow was not taken from their property. Since the property appropriated was not "actually used, damaged or destroyed" as is required by LSA-R.S. 38:281(b), as amended by Acts of 1979, No. 676, the trial court found the Millers had no basis for claiming compensation. The judgment against the Millers, dismissing their suit, is now final.

Trial continued in the remaining ten suits to determine whether the appropriated lands were batture. The trial court adopted the definition of batture used in *Boyce Cottonseed Oil Mfg. Co. v. Board of Comm'rs*, 160 La. 727, 107 So. 506, 508 (1926), *on org & reh'g*, that "batture is that part of the river bed which is uncovered at the time of low water, but is covered annually at time of ordinary

high water; when it ceases to be covered at the time of ordinary high water, it ceases to be batture and becomes the bank of the river." To implement that definition, the trial court relied upon *Wemple v. Eastham*, 150 La. 247, 90 So. 637, 638 (1922), which declared that the "ordinary high water stage" is the "highest stage that it (the river) usually reaches at any one season of the year."

In finding for PPG and dismissing the ten suits, the trial court rejected the plaintiffs' theory that ordinary high water stage is determined by examining the physical characteristics of the bank, and where physical characteristics are not clearly identifiable, by examining the types of vegetation which exist in a hydrographic environment. Instead, the trial court acceded to PPG's theory that the upper boundary of batture is the equivalent of mean high water and is determined by reviewing the statistics on the elevations the river usually reaches annually over a sufficient period of time. Utilizing that test, which it found satisfies the terms "ordinary" and "annually," the trial court calculated the mean high water at 11.0 feet, determined that Shingle Point is 97% inundated when the water reaches that stage, and concluded that all of Shingle Point is batture and subject to the constitutional and statutory exemption from compensation. The trial court accorded its conclusion with an on-site inspection of Shingle Point on March 22, 1991, when the river was at the 8.5 feet level, observing that "with the exception of a few high spots on the upriver portion, water covered the area with only the tops of trees rising above the waters."

The court of appeal affirmed. *DeSambourg v. Board of Comm'rs for Grand Prairie Levee Dist.*, 608 So. 2d 1100 (La. App. 4th Cir. 1992). It found no error in the trial court's

conclusion that all of Shingle Point was batture, noting the record supported the findings that, on the average, the highest point the river reaches at Shingle Point in any given year is approximately 11.0 feet and 97 to 99% of the surface of Shingle Point is inundated when the river reaches 11.0 feet, the areas not inundated being isolated spots created by man-made activity. 608 So. 2d at 1108.

We granted certiorari, 614 So. 2d 69 (La. 1993), to determine the meaning of "batture" as it is used in the context of the batture exemption from compensation when the state appropriates riparian land while exercising its levee servitude.

II.

The constitutional guarantee that property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit, does not apply to the taking or appropriation of property pursuant to the levee servitude. LSA-Const. Art. 1, § 4[6];

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[6] LSA-Const. art. 1, § 4 provides in pertinent part as follows:

§ 4. **Right to Property**

Section 4. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized

LSA-Const. Art. 6, § 42[7]. This "levee servitude" exception does not offend the Fifth and Fourteenth Amendments to the United States Constitution when the servitude is administered impartially since title to riparian lands have been burdened with the legal servitude for levee and road use from the time those lands were separated from the public domain. *General Box Co. v. United States,* 351 U.S. 159, 76 S.Ct. 728, 100 L.Ed. 1055 (1956), *reh'g den.*, 351 U.S. 990, 76 S.Ct. 1044, 100 L.Ed. 1502 (1956); *Eldridge v. Trezevant,* 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490 (1896). *See also Delaune v. Board of Comm'rs,* 230 La. 117, 87 So. 2d 749, 751 (1956); *Dickson v. Board of Comm'rs of Caddo Levee Dist.*, 210 La. 121, 26 So. 2d 474, 478 (1946); *State v.*

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by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner . . .

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.
(emphasis added.)

[7] LSA-Const. Art. 6, § 42 provides in pertinent part:
§ 42. Compensation for Property Used or Destroyed; Tax

Section 42. **(A) Compensation.** Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law. *However, nothing contained in this Paragraph with respect to compensation for lands and improvements shall apply to batture* or to property the control of which is vested in the state or any political subdivision for the purposes of commerce . . .

(B) Appropriation. Nothing in this Section shall prevent the appropriation of such property before payment.
(emphasis added.)

Richardson, 140 La. 329, 72 So. 984, 989-990 (1916); A.N. Yiannopoulos, 2 La. Civil Law Treatise 3d (1991) §§ 86, 88.

> From the earliest Colonial days, when the Louisiana Territory was in the possession of France and Spain, no grants of lands were ever given without a specific reservation being made therein for the common use of the public of all rights to the shores of rivers and bayous upon which they might front. These two countries never divested themselves of title to lands lying immediately adjacent to navigable streams. This policy during the Spanish occupation of the territory, became merged with the law relative to servitudes to be found in the ancient *Las Siete Partidas* of Spain and, in time, found its way into the First Civil Code adopted by the Territory of Orleans (comprising what is now known as the State of Louisiana) in 1805, after the Louisiana Territory had been acquired by the United States, the basic principles relative to servitudes in *Las Siete Partidas* being included therein almost verbatim, thus insuring that the shores of navigable rivers and streams in this state would always be kept free for the public for levee and other public purposes. *Dickson v. Board of Comm'rs of Caddo Levee Dist.*, 210 La. 121, 26 So. 2d 464, 478 (1946).

In Louisiana, title to riparian lands fronting on navigable rivers is subject to the superior right of the public's legal servitude for the making and repairing of levees,

roads and other public and common works[8]. *See Delaune v. Board of Comm'rs, supra; Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585 (1934); *Mayer v. Board of Comm'rs for Caddo Levee Dist.*, 177 La. 1119, 150 So. 295 (1933); *Dubose v. Levee Comm'rs*, 11 La. Ann. 165 (1856); 2 La. Civil Law Treatise § 88. This legal servitude for levees and levee purposes has been maintained through the transitions of the Civil Code. *See* La. Civil Code of 1808, art. 13; La. Civil Code of 1825, art. 661; La. Civil Code of 1870, art. 661, and LSA-C.C. art. 665 (1977)[9]. It applies to those lands that were riparian when separated from the public domain, and when the levee is necessary for the control of flood waters from the river to which the land taken is riparian. *Delaune v. Board of Comm'rs, supra; A.K. Roy, Inc. v. Board of Comm'rs for the Pontchartrain Levee Dist.*, 237 La. 541, 111 So. 2d 765 (1959). *See* Comment, *Levees and Batture in Louisiana*, 21 Tul.L.Rev. 649, 651 (1947).

Louisiana's sovereign settlers perceived that the riparian lands which fronted on rivers or streams were of little or no value if the arable soil was not protected from

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[8] Legal servitudes are limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons. LSA-C.C. art. 659 (1977 revision), based on art. 664 of the La. Civil Code of 1870.

[9] LSA-C.C. art. 665 provides as follows:

Art. 665, Legal public servitudes

Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

All that relates to this kind of servitude is determined by laws or particular regulations.

overflow and inundation. *Dickson v. Board of Comm'rs of Caddo Levee Dist.*, 26 So. at 478. Therefore, inserted in the original land grants from the sovereign governments was the onerous levee obligation, requiring the land proprietor to build levees on the riparian lands and to keep them in repair. *Id*, 26 So. at 478 ["in 1743 an ordinance commanded planters along the Mississippi to make their levees safe under penalty of the forfeiture of these lands to the Crown"]; *Zenor v. Parish of Concordia*, 7 La. Ann. 150 (1852); Wolfe, Richard P., *The Appropriation of Property for Levees: A Louisiana Study in Taking Without Just Compensation*, 40 Tul.L.Rev. 233, 247-248 (1966); 21 Tul.L.Rev. at 649. The original theory was the riparian proprietor should bear the burden and expense of protecting all people and their possessions from annual inundations. *Dickson v. Board of Comm'rs of Caddo Levee Dist., supra. Cf.* 2 La. Civil Law Treatise § 88; 40 Tul.L.Rev. at 334-335; *See also* 21 Tul.L.Rev. at 649. This theory continued even after the purchase of the Louisiana Territory by the United States, as riparian proprietors were obligated to construct levees at their own expense, and a right of action was created in favor of neighboring landowners whose property was damaged because of the proprietor's failure to maintain the levee, with the proprietor's riparian lands being liable *in rem* for the cost of construction of a proper levee and with the proprietor being criminally responsible for the violation. Act of March 18, 1816, La. Acts 2d Sess. 1816, at 106 *et seq;* 40 Tul.L.Rev. at 334-335.

By the mid nineteenth century, governmental philosophy and public practice changed. The onerous levee obligation ceased falling solely on the shoulders of the riparian landowners. *Dickson v. Board of Comm'rs of Caddo*

Levee Dist., supra. The necessity of an efficient and unified plan to protect the entire state from inundation was apparent. Comment, *Civil Law Property – Levee Servitude – Civil Code Article* 665, 27 La.L.Rev. 321, 328 (1967). The first levee district was created in 1852. Since 1878, the construction, maintenance and supervision of Louisiana's levee system has been entirely a function of government. *Id;* 27 La.L.Rev. at 327. *Cf.* 2 La. Civil Law Treatise § 88, p. 189; 40 Tul.L.Rev. at 233; 21 Tul.L.Rev. at 649.

Despite the changed philosophy that the riparian landowner is not solely responsible for levee obligations, the philosophical change did not alter the reservation in title of the state's levee servitude and the state's right to appropriate riparian lands. *Dickson v. Board of Comm'rs of Caddo Levee Dist., supra.* After the state assumed responsibility for levees, no right of action for compensation existed for lands appropriated pursuant to the levee servitude until Acts of 1892, No. 41 and Acts of 1894, No. 25 of the General Assembly and the Louisiana Constitution of 1898[10] imposed the requirement that the Orleans Levee

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[10] La. Const. of 1898, art. 312 provided in pertinent part as follows:

> **Art. 312.** Any person whose property has been appropriated within twelve months prior to the adoption of this Constitution, or whose property is hereafter appropriated by the Orleans levee board for levee purposes, shall have a right of action against said board . . . for the value of said property —
>
> Provided, that this shall not apply
>
> (1) To batture property,
>
> * * *

Board provide compensation for appropriated lands.[11] *Boyce Cottonseed Oil Mfg. Co. v. Board of Comm'rs of Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 106 La. 727, 107 So. 506 (1926). The Louisiana Constitution of 1921 extended the right of compensation statewide. La. Const. of 1921, Art. 16, § 6[12]. The compensation, however, was considered a "mere gratuity." *Delaune v. Board of Comm'rs*, 87 So. 2d at 753; *Pruyn v. Nelson Bros., supra.* Yet, both constitutions adhered to the axiom that no compensation was owed for the taking of batture. *See Pruyn v. Nelson Bros., supra.*

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[11] In *Ward v. Board of Levee Comm'rs of Orleans Levee Dist.*, 152 La. 158, 92 So. 769, 771 (1922), this court explained,

> But when those rural lands, thus incorporated into the city, had long been divided up into lots and sold, so that one man owned only a small lot in front, and the land behind him belonged to others, it began to appear that it was no longer a case of giving up a small part of one's land and thereby getting protection for all the rest, but of one man being required to give up *all* his land, together with the improvements thereon, in order to protect the lands, not of himself, but of others.

[12] La. Const. of 1921, Art. 16, § 6 provided in pertinent part as follows:

> **§ 6. Compensation for property used or destroyed; tax**
>
> Section 6. Lands and improvements thereon actually used or destroyed for levees or levee drainage purposes, . . . shall be paid for at a price not to exceed the assessed value of the preceding year; *provided, that this shall not apply to batture,* nor to property the control of which is vested in the State or any subdivision thereof for the purpose of commerce; . . . (emphasis added.)

The Louisiana Constitution of 1974 recognized and reaffirmed the levee servitude as a constitutional, legal servitude. *See* LSA-Const. Art. 6, §§ 38-42. Admittedly, the new Constitution altered the measure of the riparian landowners' compensation from the property's "assessed value for the proceeding year" to providing that for "lands and improvements . . . actually used or destroyed for levees or levee drainage purposes [compensation] shall be paid as provided by law."[13] LSA-Const. Art. 6, § 42(A). Nevertheless, it steadfastly maintained the batture exemption from compensation. *Id. See* Transcript, La. Const. Convention of 1973, Vol. VIII, pp. 1604-1609 (10/4/73) and 2203-22 (11/08/73).

Implementing the 1974 constitutional provision, the legislature increased compensation from "assessed value" to "fair market value to the full extent of the loss" for the actual taking of improvements and all lands *"exclusive of batture."* (emphasis added) *See* LSA-R.S. 38:301, as amended by Acts of 1985, No. 785[14]. *See also* Acts of 1978,

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[13] *See* note 7, *supra.*

[14] In 1985, Chapter 4 of title 38, R.S. 38:281 through 1480.9, was amended and reenacted by Acts 1985, No. 785, effective July 22, 1985, to consist of R.S. 38:281 through 513. The amendment had the general effect of consolidating into a single comprehensive scheme many parallel provisions.

LSA-R.S. 38:301(C)(1)(a) presently provides: "All lands, *exclusive of batture,* and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss." (emphasis added.) The general content of this provision had been contained in LSA-R.S. 38:281.

No. 314 and Acts of 1979, No. 676[15]. Thus, while significant changes occurred in compensating riparian landowners for lands and improvements appropriated pursuant to the levee servitude, the batture exemption from compensation remained constant. *See* La. Const. of

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[15] Acts of 1979, No. 835 amended and reenacted Subsections A and B of LSA-R.S. 38:281. Subsection B provided in pertinent part as follows:

> § 281. Construction and maintenance of levees and levee drainage; measure of compensation; recreation functions; filling vacancies
>
> * * *
>
> B. All lands and improvements hereafter actually used, damaged or destroyed for levees or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.
>
> The measure of compensation for lands and improvements taken or destroyed for levees and levee drainage purposes shall be the fair market value of the property taken or destroyed before the proposed use of the property or construction of the levee or the levee drainage facilities, without considering any change in value caused by the construction of the levee or the levee drainage facilities . . .
>
> * * *
>
> *However, nothing contained in this Subsection shall apply to batture* or to property, the control of which is vested in the state or any political subdivision for the purpose of commerce.
>
> *"Batture" as used in this Section shall have the same meaning as that term was defined by the courts of this state as of the effective date of the Louisiana Constitution of 1974.*
>
> (emphasis added.)

1898, Art. 312; La. Const. of 1921, Art. 16, § 6; La. Const. of 1974, Art. 6, § 42.[16]

Although the Louisiana Constitution of 1974 exempts appropriated batture lands from the payment of compensation, it does not provide a definition of the term. *See* LSA-Const. Art. 6, § 42. The legislation implementing Art. 6, § 42, defines batture as having "the same meaning as that term was defined by the courts of this state as of the effective date of the Constitution of Louisiana." LSA-R.S. 38:281(1), 301. *Accord* Acts of 1979, No. 676. This definition is consonant with the Constitution's use of the term "batture."

III.

Batture is alluvion. *Municipality No. 2 v. Orleans Cotton Press,* 18 La. 122, 210, 36 Am. Dec. 624 (1841); *Hollingsworth v. Chaffe,* 33 La. Ann. 548 (1881); *Ferriere v. City of New Orleans,* 35 La. Ann. 209 (1883); *Seibert v. Conservation Comm'n of Louisiana,* 181 La. 237, 159 So. 375 (1935). *See* LSA-C.C. art. 499 (1979). It is formed successively and imperceptibly by alluvial accretions (sedimentation). *Pulley & Erwin v. Municipality No. 2,* 18 La. 278 (1841); *Besson v. Mayor of Donaldsonville,* 49 La. Ann. 273, 21 So. 262 (1897); *Esso Standard Oil Co. v. Jones,* 233 La. 915, 98 So. 2d 236, 242, 249 (1957), *on org & reh'g* [growth is imperceptible if it can not be perceived at any given moment].

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[16] Both Acts of 1979, No. 676, applicable to the Scarsdale appropriations, and LSA-R.S. 38:301, applicable to the English Turn appropriations, which implement LSA-Const. Art. 6, § 42, exempt batture from compensation.

Batture below the ordinary low water mark is part of the bed of the river. 2 La. Civil Law Treatise § 119. To be susceptible of private ownership, the batture must be reclaimed from the river, i.e., it must form sufficient elevation and magnitude to rise above the waters and become part of the bank. *Cochran v. Fort*, 7 Mart. (N.S.) 662 (1829); *Barre v. City of New Orleans*, 22 La. Ann. 612 (1870); *Ferriere v. City of New Orleans, supra; La Branche's Heirs v. Montegut*, 47 La. Ann. 674, 17 So. 247 (1895). *See* LSA-C.C. art. 499 (1979); La. Civ. Code of 1870 art. 509; *see also* 21 Tul.L.Rev. at 660.

Title to alluvion is purely an accessory right, attaching exclusively to riparian ownership, and incapable of existing without it. *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887); *Succession of Delachaise v. Maginnis*, 44 La. Ann. 1043, 11 So. 715, 716 (1892); *Pulley & Erwin v. Municipality No. 2, supra; Municipality No. 2 v. Orleans Cotton Press, supra; State v. Richardson, supra.* The right of alluvion or batture is inherent in the riparian property, resulting from natural as well as municipal law. *Barre v. City of New Orleans, supra; Hollingsworth v. Chaffe, supra. See* LSA-C.C. art. 499 (1979); La. Civ. Code of 1870 art. 509. Like the bank, alluvion or batture belongs to the riparian owner but, as long as it is not actually incorporated into the main land – as when it is separated from it by a levee or bank – the use of both the bank and batture remains in the public. *Pulley & Erwin v. Municipality No. 2*, 18 La. at 283-4. *See Louisiana Ice Manuf'g Co. v. City of New Orleans*, 43 La. Ann. 217, 9 So. 21 (1891); *Ward v. Board of Levee Comm'rs of Orleans Levee Dist.*, 152 La. 158, 92 So. 769, 775 (1922) [held that as to batture and the La. Const. of 1921, "the levee servitude extends only over the levees

and the batture formed between the levee and river"]. *See* LSA-C.C. art. 499 (1979); La. Civ. Code of 1870 art. 509. Consequently, the riparian landowner has only naked legal title to the batture property subject to the servitude, without right of *usus* and *fructus*. *Warriner v. Board of Comm'rs of Port of New Orleans*, 132 La. 1098, 62 So. 157, 159 (1913). *See* LSA-C.C. art. 563 (1976)[17]; 2 La. Civil Law Treatise § 87; 21 Tul.L.Rev. at 661-663.

The land mass of batture susceptible of private ownership can become quite extensive. In *Cochran v. Fort, supra*, a cabin was built on the batture; in *Minor's Heir v. City of New Orleans*, 115 La. 301, 38 So. 999 (1905), *Hunt v. City of New Orleans*, 148 La. 754, 87 So. 736 (1921) and *Heirs of Leonard v. City of Baton Rouge, supra*, railroad tracks were built on the batture; in *Succession of Delachaise v. Maginnis, supra, Louisiana Ice Manuf'g Co. v. City of New Orleans, supra, Ferriere v. City of New Orleans, supra, Hunt v. City of New Orleans, supra*, and *St. Anna's Asylum v. City of New Orleans*, 104 La. 392, 29 So. 117 (1900), one or more city streets were located on the batture parallel to the river. Further, batture terrain was described as wooded pasturage in *Louisiana Ry. & Navigation Co. v. Knox*, 125 La. 454, 51 So. 493 (1910), and as "soggy [land], covered

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[17] Acts of 1976, No. 103, enacting LSA-C.C. art. 563, reproduced the substance of La. Civil Code of 1870 art. 553, but changed the law as it extends the right of the usufructuary to land formed in a river. Revision comments, section (a). LSA-C.C. art. 563 provides as follows:

> Art. 563. Alluvion
>
> The usufruct extends to the increase to the land caused by alluvion or dereliction.

with a semiaquatic growth of willows, cottonwoods, and cockle burrs" in *State v. Richardson*, 72 So. at 986.

Batture has significant meaning in Louisiana history, law and jurisprudence. In the context of litigation on riparian rights of accretion, this court stated in *Morgan v. Livingston*, 6 Mart. (O.S.) 19, 216 (1819), that batture

> is, according to Richlet and the French academy, a marine term, and is used to denote a bottom of sand, stone or rock mixed together, and rising towards the surface of the water: its etymology is from the verb battre, to beat: because a batture is beaten by the water. In its grammatical sense, as a technical word, and we believe in common parlance, it is the elevation of the bed of a river, under the surface of the water, since it is rising towards it. *It is, however, sometimes used to denote the same elevation of the bank, when it has arisen above the surface of the water, or is as high as the land on the outside of the bank.* (emphasis added)

The defendant therein endeavored, but failed, to establish that the batture existed at a certain point in time and was of the latter kind, a batture above the surface of the water. *Morgan's* definition was cited with approval in *Hollingsworth v. Chaffe*, 33 La. Ann. at 551, and endorsed in *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1886). In the latter case, riparian landowners sought, but failed, to recover batture from the city claiming the city was withholding more batture than was necessary for public use. This court declared "[t]he word 'batture' has a precise legal signification," and provided a definition similar to *Morgan's*, but more pertinent to batture when it is susceptible of private ownership: "*Vide*

Bouv. Law Dict. *verbo "batture"*: 'An elevation of the bed of a river under the surface of the water; but it is sometimes used to signify the same elevation when it has risen above the surface. *The term 'battures' is applied principally to certain portions of the bed of the Mississippi river which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.'* " 4 So. at 248. (emphasis added)

This court subsequently gave meaning to batture in the context of levee servitude appropriation in *Boyce Cottonseed Oil Mfg. Co. v. Board of Comm'rs*, 107 So. at 508-509. Plaintiff had prevailed on his claim that his land had been destroyed for levee purposes within the meaning of the Constitution of 1921 when the levee was built behind his property, leaving the property between the levee and the river. In rejecting defendant's claim that the property was batture property within the meaning of the Constitution's batture exemption from compensation, this court determined without elaborating on the issue:

> But plaintiff's land was *not* batture. The batture is that part of the river bed (sic) which is uncovered at time of low water, but is covered annually at the time of *ordinary* high water; when it ceases to be covered at the time of ordinary high water, it ceases to be *batture* and becomes part of the *bank* of the river. R.C.C. 457; Ward v. Board of Levee Commissioners, 92 So. 769, 772, 152 La. 158, 166.
>
> Plaintiff's land was *not* covered in times of *ordinary* high water, although it had been covered by water on several occasions in periods of extraordinary high water during the last half of

the century. (emphasis in original) 107 So. at 508-509.

Boyce illustrates that merely because land is on the outside of the levee, i.e., between the levee and the river, it is not necessarily batture. The pivotal factor to the *Boyce* court was whether the property was covered by ordinary high water. The court decided the land was not batture without specifying whether the land had alluvial origin. The factual circumstances that plaintiff's land and improvements "were thrown outside the levee" imply, however, that either it was not of alluvial origin or was of alluvial origin but had ceased to be batture[18] because the land had risen to such a height that it was not covered by ordinary high water.

From the foregoing we conclude that, according to pre-1974 jurisprudence of this court, batture is of alluvial origin; by accessory right it belongs to the riparian landowner when it rises above the bed of the stream or river; and it is subject to the Article 665 levee servitude when it is on the outside of the levee. Nevertheless, due to the limiting language in *Boyce* (and *Heirs of Leonard*), alluvial accretions are not subject to the batture exemption from compensation when it ceases to be covered annually by "ordinary high water." *See* 21 Tul.L.Rev. at 661.

The manner in which the *Boyce* court used the phrase "ordinary high water" connotes that the phrase means the highest level the river inevitably reaches during annual seasons of high water. Ordinary high water, then,

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[18] *Minor's Heirs v. City of New Orleans, supra,* and *Succession of Delachaise v. Maginnis, supra,* indicate that batture property can cease to be batture.

is the highest water stage the river can be *expected* to reach annually, but not the level the water reaches during major flood events, i.e., reaches "on several occasions in periods of extraordinary high water during the last half of the century." 107 So. at 509. This meaning is consistent with the description of batture in *Heirs of Leonard v. City of Baton Rouge*, 4 So. at 243, as land covered by "annual swells," and in *Warriner v. Board of Comm'rs for the Port of New Orleans*, 62 So. at 158, as land subject to "periodical overflow." It is also consistent with the description of the upper boundary of the bank employed in *Morgan v. Livingston*, 6 Mart. (O.S.) at 229, that "the bank is the space which the water covers when the river is highest in any season of the year," and in *Wemple v. Eastham*, 90 So. at 638, that it is "the line which the edge of the water reaches at its ordinary high stage – that is, the highest stage that it usually reaches at any season of the year." *See* LSA-C.C. art. 456. Moreover, this definition, derived from pre-1974 jurisprudence, peacefully coexists with the purpose of the batture exemption, as it exposes a sufficient land surface for the exemption to be practicably utilized. A more restrictive meaning of ordinary high water would threaten the social utility of the exemption, as well as emasculating its practical purpose.

IV.

Plaintiffs' theory that the upper boundary of batture must be determined by the physical characteristics of ordinary high water on the bank, is inharmonious and discordant with Louisiana's jurisprudential definition of batture. Plaintiff's botanist, Dr. Luther F. Holloway, accepted by the trial court as an expert in determining

vegetation demarcations, indicated his working definition of ordinary high water, which he derived from federal jurisprudence and onsite observations, corresponded to the COE's definition of the phrase for its determination of navigational servitudes, sovereignty boundary lines, etc. Dr. Holloway testified that the ordinary high water line relates to physical fact criteria and, basically, is the point in the river or stream where the water duration physically marks the soil and vegetation. Applying his definition, he placed the ordinary high water mark of Shingle Point at 8.5 feet because the water plants that tolerate substantial amounts of water ended at that line break. Under his definition of ordinary high water, most of Shingle Point cannot be batture merely because it is covered with various trees. Such a definition is antithetic to pre-1974 jurisprudence in which batture lands were described as wooded pasturage and/or semiaquatic with "growth of willows, cottonwoods, and cockle burrs." *See Louisiana Ry. & Navigation Co. v. Knox, supra,* and *State v. Richardson, supra.* It is also contrary to the trial court's onsite observation which showed Shingle Point, including its vegetation and trees, inundated at the 8.5 feet level.

Moreover, plaintiffs' hydrologist, Dr. Chester C. Watson, testified that the water level at Shingle Point is at or above 10.6 feet 5% of the year [approximately 18 days annually], at or above 9.78 feet 10% of the year [approximately 36 days annually], and at or above 8.44 feet 20% of the year [approximately 73 days annually]. Dr. Holloway also admitted the natural flood plane at Shingle Point is around 11.0 feet. Nevertheless, under Dr. Holloway's definition of ordinary high water, flooding [which would be any water levels above the 8.5 feet level] would

persist 20% of the year [approximately 73 days annually] and would occur when the water is 0.2 of a foot above the toe (bottom) of the levee at Shingle Point. Application of his working definition of ordinary high water, which plaintiffs claim is a standard of federal and common law, produces results contrary to pre-1974 jurisprudence defining and characterizing batture, and confuses the distinction between major flood events and annual high water levels.

The construction of the phrase "ordinary high water" as it pertains to the batture exemption from compensation for levee servitudes depends solely upon pre-1974 jurisprudence of this state. The laws and jurisprudence of France, our sister states, and the United States are irrelevant to the quest for the meaning of ordinary high water in relation to the levee servitude and the rights of riparian landowners in Louisiana. *State v. Richardson*, 72 So. at 987.[19] The phrase must be construed in the context of the nature of batture and the history and purpose of

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[19] In *State v. Richardson*, 72 So. at 987, this court declared that although as a matter of federal constitutional law, by virtue of her sovereignty, Louisiana's boundary line on navigable waters was fixed at the mean/ordinary high water mark, the rights of riparian landowners is governed by Louisiana law. Consequently, riparian landowners on the banks of navigable rivers and streams own the banks, which is the land between the ordinary low and the ordinary high stage of the water, or when the levee is in close proximity to the water, the levee forms the bank. LSA-C.C. art. 456. Thus, the *Richardson* court concluded that the laws and jurisprudence of France, our sister states, and the United States is not relevant to the inquiry of what ordinary or mean high water is in relation to the levee servitude and the rights of riparian landowners. 72 So. at 987.

Louisiana's batture exemption. Therefore, contrary to plaintiffs' contentions, Louisiana is not bound to indiscriminately follow a federal or common law definition of ordinary high water which has no connection to our definition of batture, the levee servitude or riparian landowner rights, as set forth in our Constitution, legislation and jurisprudence.

V.

Applying these legal precepts to the findings and determinations of the trial court, as affirmed by the court of appeal, we find no error in their conclusions that all of Shingle Point is batture.

Both lower courts agreed that Shingle Point is composed of alluvial buildup, with the court of appeal indicating Shingle Point was characterized by defendant's fluvial geomorphalogist as an accumulation of sediment on the inside of a meander bend. 608 So. 2d at 1107. The trial court concluded that *Boyce* and *Wemple* established the controlling guidelines for determining whether the plaintiffs' appropriated land was batture; that those cases meant "ordinary high water" is the highest stage that the river usually reaches annually; and that statistics "regarding the elevations the river usually reaches during approximately each year over a sufficient period of time" can be employed to satisfy the standards of *Boyce* and *Wemple*. The trial court utilized evidence of mean high water, the average of annual river stage peaks at a given location, to implement the definition of ordinary high

water. Its determination is compatible with our interpretation of batture and "ordinary high water" as they pertain to the batture exemption.

As previously stated, the manner in which the *Boyce* court used "ordinary high water," the phrase means the highest level the river inevitably reaches during annual seasons of high water, which is the highest stage the river can be expected to reach yearly. The method employed for determining ordinary high water by defense experts and accepted by the trial court, is the method used for determining mean high water, the highest stage reached by the river approximately every year. The trial court did not err by applying that standard. It is consistent with the methodology accepted by this court for determining ordinary low water. *See Esso Standard Oil Co. v. Jones*, 98 So. 2d at 242. Likewise, the corollary method is acceptable for determining the level of ordinary high water.

The trial court's calculation of mean high water was drawn from almost a century of river gauge data accumulated by the COE and reflected the normal behavior of the river without consideration of unusually high or low annual readings. The trial court indicated the overwhelming weight of expert testimony revealed mean high water at the times of the appropriations at Shingle Point was 11.0 feet and, accordingly, adopted 11.0 feet as the ordinary high water stage.[20] The trial court indicated that in

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[20] In comparison, trial evidence showed floods which occur approximately every 9 years and which the National Weather Service labels as a minimum flood stage, is the 12.5 feet level at Shingle Point.

1973-75, several years prior to the Scarsdale project excavation, land elevations measured at Shingle [P]oint were as follows: 10.2, 7.2, 9.3, 6.9, 7.7, 6.1, 8.7, 8.4, 9.5 and 10.8 feet. Immediately prior to the English Turn project excavation, the COE recorded twenty-five land elevations. Two elevations marginally exceeded 11.0 feet while the remaining twenty-three elevations were as follows: 8.7, 8.9, 10.2, 8.2, 6.7, 8.7, 8.3, 11.0, 10.8, 9.6, 8.0, 10.5, 7.7, 5.5, 6.2, 8.2, 7.2, 8.1, 6.97, 9.2, 9.2, 9.3, and 8.0 feet. Thus, based on elevational data showing 97% of Shingle Point is inundated when the river reaches 11.0 feet; on evidence that the only areas of Shingle Point not inundated when the river is 11.0 feet are isolated high spots created by man-made activity (prior excavations); and on the trial court's on-site inspection which revealed "with the exception of a few high spots on the up river portion, water covered the area with only the tops of the trees rising above the waters" when the river was 8.5 feet, the trial court concluded all of Shingle Point is batture and exempt from compensation.

In its review of the correctness of the trial court's factual findings, the court of appeal indicated that testimonial evidence based on historical maps/hydrographic surveys, aerial photographs and river gauge data compiled by the COE showed that while the maximum land elevations at Shingle Point varied over time, annual high water elevations of the river exceeded the highest land elevations. It also indicated that expert witnesses concluded from their analysis of river gauge records that, on average, the highest stage the river reaches in any given year is approximately 11.0 feet. Based on the elevational data, the experts concluded that 97 to 99% of the surface

of Shingle Point is inundated at the 11.0 feet stage, with the only areas not inundated being isolated high spots created by man-made activity. Therefore, it found no error in the trial court's conclusion that all of Shingle Point was batture at the time of the appropriations and, consequently, exempt from compensation under constitutional and statutory authority.

Louisiana's three-tiered court system allocates the fact finding function to the trial courts. *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106 (La. 1990); *Virgil v. American Guarantee and Liability Ins. Co.*, 507 So. 2d 825 (La. 1987). We find no error in the appellate court's determination that the trial court did not abuse its discretion in evaluating the testimony of the parties' expert witnesses or in making its factual findings. Therefore, as the trial court's finding that the land taken from plaintiffs is batture, is consistent with the definition of batture as the term is used in the context of the batture exemption from compensation for the state's appropriation of riparian land pursuant to LSA-Const. Art. 6, §42 and LSA-R.S. 38:301(C)(1)(a), we affirm.

DECREE

For the reasons assigned, the judgments of the lower courts in favor of defendant and dismissing the plaintiffs' consolidated suits, are affirmed. Costs are assessed against plaintiffs.

AFFIRMED

SUPREME COURT OF LOUISIANA

No. 93-C-0167

WARREN DeSAMBOURG ET AL

Versus

BOARD OF COMMISSIONERS FOR GRAND PRAIRIE LEVEE DISTRICT

LEMMON, Justice, Concurring

The ordinary high water stage is the level that the river in most years reaches and remains at for a substantial period of time. The evidence in this case that the river almost every year at Shingle Point reaches the level of eleven feet and stays at that level for a substantial number of days supports the trial judge's conclusion that the ordinary high water stage was eleven feet.

SUPREME COURT OF LOUISIANA

SEP 2 1993

No. 93-C-0167

WARREN DeSAMBOURG AND MARY DeSAMBOURG

Versus

BOARD OF COMMISSIONERS FOR THE GRAND PRAIRIE LEVEE DISTRICT

DENNIS, J., dissenting.

I respectfully dissent.

The constitution declares that lands and improvements actually used or destroyed for levees or levee drainage purposes "shall be paid for as provided by law," with the exception of "batture or property the control of which is vested in the state or in an [sic] political subdivision for the purpose of commerce." La. Const. art. 6 § 42 (1974). Previously, the constitution had provided that all lands and improvements actually used or destroyed for levee or levee drainage purposes, "shall be paid for at a price not to exceed the assessed value of the preceding year; provided, that this shall not apply to batture, nor to property the control of which is vested in the state or any subdivision thereof for the purposes of commerce." La. Const. art. 16 § 6 (1921). Under Article 665 of the Civil Code lands fronting navigable rivers are burdened by a servitude of public use for the construction and maintenance of levees.

For purposes of interpreting article 665 of the Civil Code and Article 16, Section 6 of the 1921 Constitution, this court has consistently defined batture as the area between ordinary low and ordinary high stage of the

water of a navigable river. Boyce Cottonseed Oil Mfg. Co. Board of Commissioners, 160 La. 727, 107 So. 506 (1926); Maynard v. United States, through U.S.Corps of Engineers, 587 F.2d 788 (5th Cir. 1979). Therefore, levee boards are bound to pay an indemnity for land between the ordinary high water mark and a levee actually used or destroyed for levee purposes. Boyce v. Cottonseed Oil Mfg. Co. v. Board of Com., supra; See also Pruyn v. Nelson Brothers, 180 La. 760, 157 So. 585 (1926); Ward v. Board of Levee Com., 152 La. 158, 92 So. 769 (1922); Mithoff v. Town of Carrollton, 12 La. Ann. 185 (1857); De Ben v. Gerard, 4 La. Ann. 30 (1849). This interpretation of "batture" for such purposes has been adopted by the United States Supreme Court. General Box Co. v. United States, 351 U.S. 159 (1956); 2 Yiannopoulos, Property § 89.

A river consists of three things: "the water, the bed, and the banks." Morgan v. Livingston, 6 Mart. (O.S.) 19, 229 (1816); 2 Yiannopoulos, Property § 84. The water and bed of a navigable river are public things, whereas the banks are private things subject to public use. Id. The word "bed" is not defined in the Louisiana Civil Code, but according to necessary implication the bed is "the land covered by the water in its ordinary low stage." Wemple v. Eastham, 150 La. 247, 90 So. 637 (1922); 2 Yiannopoulos, supra.

Previously, in cases involving delimitation between bed and bank, this court has rejected methods involving arithmetical water level averaging and held that the testimony of the witnesses who lived in the vicinity is to be favored over such abstract mathematical measurements. Seibert v. Conservation Comm. of La., 181 La. 237, 159 So. 375 (1935). The same problems presented by arithmetical

averaging to determining the ordinary low water mark in *Seibert* are present when using statistical averaging to determine the "ordinary high water mark" as is required in this case. In summary, the fallacies and frailties involved in arithmetical expert data are as follows:

* Peak flow and flood stages have historically been excluded in Louisiana when determining the proper demarcation of the bank of the river. Boyce v. Cottonseed Oil Mfg. Co. v. Board of Com., supra; Wemple v. Eastham, supra.

* This court has never accepted arithmetical computations of water levels to determine the low or high water mark. Statistical averaging techniques are only appropriate when determining the high tide line of waters subject to tidal influence. To determine the ordinary high water mark reference must be had to the physical characteristics of the banks and bed of the water body as determined by physical evidence or witness testimony. Maloney, The Ordinary High Water Mark: Attempts at Settling An Unsettled Boundary Line, 13 Land and Water L. Rev. 465, 467 (1978).

* There is an inherent danger in relying on expert witnesses, even those in good faith, who are free to select which peaks to include and exclude, the number of days and years that are included in the average, and the duration of the levels included in the calculation. The court in *Willis v. U.S.*, 50 F. Supp. 99 (S.D. Va. 1943) reasoned that arithmetical averaging "would be inappropriate because any result reached would depend upon a time period and frequency of occurrence arbitrarily selected by the individual analyst. While useful for engineering purposes, the statistical averaging approach was 'utterly unreliable as a means of determining the respective rights of the United

States and the riparian property owner.' " Id. at 101; See Maloney, supra at 494-98.

* The problem created if statistical averaging is recognized as the method for determining the high water mark is a battle of experts. The court in *Siebert*, confronted with conflicting expert testimony based on arithmetical averaging, expressed the problem: "Which is correct and most reasonable in this particular instance is a matter of considerable confusion. We therefore resort to lay testimony which we find to have been used in connection with all previous litigation of this nature."

* A high water mark determined by statistical averaging is an artificial, abstract line that may have no relationship with the actual "ordinary" high water mark.

* The lay testimony in the record indicates that the water does not always reach or ordinarily reach the 11 foot line.

* To further elaborate on the inherent problems with statistical averaging, one reasonable interpretation of the statistics presented by the defendant, Plaquemines Parish Gov't, indicates that the 11 foot line was not reached at any time in 9 of the 13 years covered in the survey. This shows that, given enough data and discretion, a good statistician can prove one side of a proposition as easily as the other. "We prove what we want to prove, and the real difficulty is to know what we want to prove." Chartier, *Systeme des Beaux-Arts.*

Accordingly, I believe we should adhere to our former well established jurisprudence and require that the decisions as to the ordinary high water mark be based on the testimony of witnesses in the vicinity. The decision below fails to follow this well established method accepted in our earlier opinions. Otherwise, too much

power will be given to governments to use statistics to extend the mark shoreward and take more land from private landowners without just compensation. The constitutional provision which allows the taking of batture without compensation should be strictly construed.

APPENDIX "B"

(144.15368)

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 30-304 DIVISION "B" DOCKET NO.

CHARLES MILLER
versus
PLAQUEMINES PARISH GOVERNMENT

Consolidated with

NO. 26-747 DIVISION "B" DOCKET NO.

WARREN DESAMBOURG and
MARY BURNS DESAMBOURG
versus
PLAQUEMINES PARISH GOVERNMENT

FILED: JUL-8 1991 /s/ Dorothy M. Chevalier
DEPUTY CLERK

JUDGMENT

This matter having come before the Court on the motion for summary judgment filed by defendant Plaquemines Parish Government, said motion having been deferred to trial on the merits commencing March 18, 1991; and for the reasons stated in open Court on March 19, 1991;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Plaquemines Parish Government's motion for summary judgment is granted, and

that the claims of petitioners Charles Miller and Ina Picarella Miller are hereby dismissed at their cost.

THUS DONE AND SIGNED, Baton Rouge, Louisiana, this 8 day of July, 1991.

/s/ Lewis S. Doherty, III
LEWIS S. DOHERTY, III
JUDGE AD HOC
25th JUDICIAL DISTRICT COURT

(144.15368)

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

DIVISION "B" DOCKET NO.

WARREN DESAMBOURG, ET AL.

VERSUS

PLAQUEMINES PARISH GOVERNMENT

NO. 26-747 C/W
26-748
26-765
26-766
26-881
30-301
30-302
30-303
30-305
30-999

FILED: JUL-8 1991 /s/ Dorothy M. Chevalier
DEPUTY CLERK

JUDGMENT

The above captioned consolidated cases having come before the Court for trial on the merits on March 18-22, 1991, and for the reasons set forth in the Court's "Written Reasons for Judgment" dated June 24, 1991 and filed June 26, 1991:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that in each of the above captioned cases, there be judgment in favor of defendant Plaquemines Parish Government, dismissing the claims of all plaintiffs in each said case at their cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that expert witness fees of the following witnesses are fixed and taxed as costs: Dr. Richard Kesel – $1,500.00; Dr. Lowell Urbatsch – $1,500.00; Curtis Barrett – $1,500.00; Wilton Dufrene – $750.00; Dr. Luther F. Holloway – $1,500.00; Dr. William Patrick – $1,500.00; Dr. Chester E. Watson – $1,500.00; Max Derbes – $1,500.00; Hugh B. McCurdy, Jr. – $750.00; and Irvington Eppling – $1,500,00.

THUS DONE AND SIGNED, Baton Rouge, Louisiana, this 8 day of July, 1991.

/s/ Lewis S. Doherty, III
LEWIS S. DOHERTY, III
JUDGE AD HOC
25th JUDICIAL DISTRICT COURT

APPENDIX "C"

25TH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

deSAMBOURG, ET AL.	NO. 26-747 c/w
	26-748
versus	26-765
PLAQUEMINES PARISH	26-766
GOVERNMENT	26-881
	30-301-303
	30-305
	30-999

DATE FILED JUN 26, 1991
/s/ Dorothy M. Chevalier
DEPUTY CLERK

WRITTEN REASONS FOR JUDGMENT

Eleven consolidated suits form the basis of claims by various riparian owners of lands located along the Mississippi River in Plaquemines Parish. The plaintiffs contend that they are entitled to compensation for the taking of their property for levee purposes. The defendant, Plaquemines Parish Government ("PPG"), contends that it is not liable to pay compensation because the plaintiffs' land lies between the levee and the river and is "batture" and, consequently, under the provisions of the Louisiana Constitution of 1974 and state statutes is exempt from the ordinary requirement that the payment of compensation is due when the property is appropriated by public authorities for levee improvement purposes. The issue

thus presented is: What is the scope of the batture exemption and its application to the facts of the case here under consideration.

Pursuant to the Mississippi River Flood Control Act of 1928, 33 USC §701-09, the United States Corps of Engineers ("COE") oversees and maintains the Mississippi River and levee system in Plaquemines Parish. Improvements to or enlargements of the levees are initiated and supervised by the COE in cooperation with the PPG. Once the COE selects the site to improve the levee, the PPG is then obligated to furnish all needed rights of way and to appropriate[1] riparian property for these purposes.

FACTS

The land in question known as "Shingle Point" consists of approximately fifty acres lying between the edge of the Mississippi River and the levee on the left descending bank of the river at English turn. There are no buildings on Shingle Point, and there has been no agricultural

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1 "Appropriation" is a term of legal designation, unique to Louisiana law and quite different from the commonly encountered concept of "expropriation." Appropriation is the governing authority's exercise of the levee servitude through the taking of riparian property for the purpose of building and/or repairing levees. *Delaune v. City of Kenner*, 550 So.2d 1386 (La. App. 5th Cir. 1989), writ denied, 553 So.2d 124 (1989). The taking of property by eminent domain is termed "expropriation" in Louisiana as distinguished from "appropriation," the term applied to the taking of the riparian servitude. 40 T.L.R. 243. Actually, title to property does not change through appropriation.

activity carried on in recent history. The alluvial buildup of the river at this point has served as a mining operation for dirt for levee development during the past 100 years or so. At the conclusion of the trial on March 22, 1991, the Court inspected the site. The river was at high water and, except for the upriver end of the tract, very little but willow trees were exposed above the river's waters.

Two levee projects initiated by the United States Corps of Engineers prompted action by PPG to appropriate subject properties. These projects have been described as the Scarsdale-Stella Levee Set Back and Road Relocation Project ("Scarsdale") and the English Turn Levee Enlargement and Concrete Slope Pavement Project ("English Turn").

With respect to the Scarsdale project, the PPG adopted resolutions dated March 3, 1982, July 28, 1982 and June 15, 1988, wherein all of the lands reflected in a government survey were appropriated for the purpose of acquiring fill dirt for purposes of obtaining a temporary servitude of access and for the removal of the dirt on the plaintiffs' land between the river and the levee. The contract for work on the Scarsdale project was issued on September 29, 1983, and the project "was completed December 1984."[2] According to the Corps of Engineers documents,[3] the amounts of dirt used were as follows:

Compacted fill	6,139.0 cubic yards
Semi-compacted fill	153,208.0 yards

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[2] Affidavit of Paul Griffith, III, dated October 4, 1990, attached to a Motion for Summary Judgment and identified as Exhibit B.

[3] Stipulation of counsel for parties.

Uncompacted fill	14,098.0 yards

This material was hauled 2.1 miles from the place where it was dug to the site of the improvements to the levee. Most all of the dirt was removed from the properties of Schell, deSambourg, Seibert, Perino and Mancuso, and suits by these landowners followed and are referred to as the "deSambourg" suits.

With regard to the English Turn project, the property used was appropriated by resolutions of the Parish Council on January 8, 1986, June 11, 1986, November 12, 1987, and April 14, 1988. Again, the parish appropriated a temporary servitude to facilitate the removal of dirt, and the right of access on the plaintiffs' lands between the levee and the river.

The contract for the English Turn project was dated September 28, 1986, and according to PPG's affidavit, the project "was completed in December 1988." The amount of dirt used for this project is as follows:

Semi-compacted fill	156,507.57 yards
Uncompacted fill	6,846.00 yards

Much of the dirt in this project was removed from the DiCarlo, LaGreco and Heir[sic]/Himel tracts. Some dirt for the English Turn project may have been removed from the Schell, deSambourg and Seibert tracts.

The ownership of the tracts of the plaintiffs in the respective suits is listed as follows:

OWNER	Lot No.	Arpents	Acreage Between River & Levee
Charles and Ina Miller	21	1	3.9
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Joseph A. and Linda LaGreco	19A & 19B	1	4.3
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Henry J. and Erica H. Heier/Edward Himel	15-17	3	13.5
Albert L. and Rosalie Schell	11	1	4.7
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Joseph, Sr. and Sadie Perino	7B	1/2	2.1
Charles and Angelina Mancuso	7A	1/2	2.1

Following the filing of the respective suits, a Motion for Summary Judgment was filed by the PPG directed to the claim of Charles and Ina Miller in which it was contended that the servitude which was appropriated was not only not utilized by the defendant and its contractor, but that no dirt was removed from the Millers' tract. Since under LSA-R.S. 38:281(b), as amended by Act 676 of 1979, compensation is due for levee "appropriation" *only* where the lands and improvements are " . . . *actually used, damaged or destroyed* . . . ", there is no basis for recovery of compensation, where as in this instance, the

servitude was not exercised. For this reason, the motion for summary judgment was granted and the Millers' suit dismissed. (Emphasis supplied by Court.)

LAW

An examination of the historical development of the law with respect to the issues presented by the contention of the respective parties is necessary. Before the turn of the 18th century, owners of land located along the Mississippi River began to commence construction of levees to protect their lands from the seasonal ravages of flooding. There was no reimbursement from the state for their expense in making these improvements. However, the burden proved to be too great and the levee districts were created in the late 1800's to construct and maintain the levees in each of their respective levee districts. See Constitution of 1879, Arts. 213-15; La. Acts 1879, No. 33 and La. Acts 1882, No. 10. The creation of the levee districts free the landowners of the obligation of constructing their levees, but it did not free their land from the riparian levee servitude which was created in Article 13 of the Civil Code of 1808 and continued through Article 661 of the Code of 1825 and the Code of 1870, now finally appearing in the 1977 revision of the property articles as Article 665. See 2 Yiannopolous Civil Law Treatise – Property at 169 (2d Ed. 1980).

Presently, Article 665 provides:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making

> and repairing of levees, roads and other public or common works.
>
> All that relates to this kind of servitude is determined by laws or particular regulations.

For the first time, Louisiana Constitution of 1898 imposed a requirement that lands appropriated by the Orleans Levee Board would have to pay for lands appropriated by them for levee purposes. Article 312 of the 1898 Constitution. This requirement was extended statewide by the Constitution of 1921. Article 16, Section 6 provided that all lands and improvements used or destroyed for levee purposes "shall be paid at a price not to exceed the assessed value of the preceding year, provided that this shall not apply to batture;. . . . "

The Constitution of 1974 made a significant adjustment of the levee servitude. Yiannopolous, *supra*, at 172. Article VI, Section 42 of the Louisiana Constitution of 1974 provides:

> Notwithstanding any contrary provision of this Constitution, lands and improvements thereon hereafter actually used or destroyed for levee or levee drainage purposes shall be paid for as provided by law with the exception of batture or property the control of which is vested in the State as in a political subdivision for the purposes of commerce.

This section authorized the Legislature to provide a method of payment for property used or destroyed for levee purposes. The previous limitation on compensation (the assessed value for the preceding year) was continued in effect as a statute by La. Const. Art. XIV, §16 (1974)

subject to change by law. *Board of Com'rs v. Percle*, 535 So.2d 1240 (La. App. 3rd Cir. 1988).

The Legislature thereafter implemented the constitutional provision with respect to compensation to be paid to owners of riparian lands by enacting Act 314 of 1978 by changing the measure of payment from assessed value to fair market value. More specifically, Act 785 of 1985, now contained in LSA-R.S. 38:301(C)(l)(a) declares:

> All lands, exclusive of batture, and improvements hereinafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

Although the riparian landowner still owes the legal servitude of Civil Code article 665, the public (i.e. state, levee board) can no longer exercise that servitude without payment of just compensation which is fair market value. *Tenneco Oil Co. v. Board of Com'rs*, 567 So.2d 113 (La. App. 4th Cir. 1990). But, it must be observed that the legislature maintained the 1974 constitutional provision by exempting "batture" from the mandate to compensate the landowner.

BATTURE

That the lands appropriated are batture and exempt from the payment of compensation is the heart of the PPG's defense to plaintiffs' claims. The term "batture" is not defined by the Louisiana Constitution of 1974, but Acts 1979, No. 676 provided that "Batture" as used in this section shall have the same meaning as that term was defined by the courts of this state as of the effective date

of the Louisiana Constitution of 1974," and La. R.S. 38:281(1) now contains an identical provision. In utilizing the term "batture" in the Louisiana Constitution of 1974, it is apparent to the writer that the delegates to the convention believed that "batture" included all of the land resting on the unprotected side of the levee and were unaware of the jurisprudence which reflected that some of those lands may not consist entirely of batture.[4] Transcript, La. Const. Conv. of 1973, Vol. VIII, 11/8/83, pp. 2205-2208.

In *Boyce Cottonseed Oil Mfg. Co. v. Bd. of Comm'rs*, 160 La. 727, 107 So. 506 (1926), the court provided a jurisprudential definition as follows:

> The batture is that part of the riverbed which is uncovered at the time of low water but is covered annually at the time of ordinary high water; when it ceases to be covered at the time of ordinary high water, it ceases to be batture and becomes the bank of the river.

Professor Yiannoupoulos in his Louisiana Civil Law Treatise, Vol. II, §57, observed that "For purposes of interpretation of Article 665 of the Louisiana Civil Code and Article 16, Section 6 of the Louisiana Constitution of 1921, the Louisiana Supreme Court has consistently defined batture as the area between ordinary low and ordinary high stage of the water of a navigable river." *Id.* at 175. Professor Yiannoupoulos went on to say: "This is, of course, the definition of the natural bank of the river, as

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[4] Thus the constitution and R.S. 38:301 requires payment at fair market value for that portion of the bank taken which is not batture, *Tenneso* [sic] *Oil, supra.*

distinguished from the definition of the second paragraph of Article 457 of the 1870 Code. Thus levee boards were, and continue to be, bound to pay on indemnity for land between the ordinary high water mark and a levee actually used or destroyed for levee purposes." The definition thus supplied in *Boyce, supra,* leads to an inquiry as to what is the ordinary high water stage of a navigable stream and how is it determined.

The Louisiana Supreme Court in *Wemple v. Eastham,* 150 La. 247, 90 So. 637 (1922), declared the "ordinary high water stage" as being "the highest stage that it (the river) usually reaches at any season of the year . . . " However, the "ordinary high water mark does not necessarily encompass the peak flow or flood stage." *Buttery v. U.S.,* 575 F.Supp. 283 (E.D. La. 1983). Also *Oklahoma v. Texas,* 260 U.S. 626, 43 S.Ct. 221, 67 L.Ed. 428 (1923).

The petitioners assert that the ordinary high water stage should be determined from the examination of the physical characteristics of the bank and, in some instances, where the physical characteristics are not clearly identifiable, resort should be made to examination of the types of vegetation which exist in a hydrographic environment. On the other hand, the defendant submits that ordinary high water stage is the levee which restrains the river at its highest stage if the levee is in "proximity" to the river[5] and, if not, the stage should be determined by looking to the mean annual high water, which they submit exceeds the land elevation of Shingle Point. The foundation of plaintiffs' argument is centered

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[5] (La. Civ. Code art. 456)

more on federal regulations and jurisprudence, whereas the defendant's argument is primarily based on how the term is employed in Louisiana cases. The court will agree with PPG's assertions that the federal regulations define river bed and ordinary high water with respect to the federal government's navigational servitude which is different from the Louisiana cases which deal with the public's 665 servitude and the rights of the riparian landowner.

In making a determination as to what method would be proper, this court must resort to the guidelines established by the two cases, *Wemple* and *Boyce, supra. Wemple,* which has been consistently cited with approval by the Louisiana Supreme Court and by lower appellate courts, specifically identifies the ordinary high stage as being "the highest stage that the river *usually* reaches at any season of the year. . . . " Webster defines "usual," among other things, as "found in ordinary practice or in the ordinary course of events." *Webster's Ninth New Collegiate Dictionary,* Merriam-Webster, Inc. (1983). *Boyce, supra,* utilizes the term "annually" in incorporating ordinary high water as the upper boundary of batture. In the court's opinion, it is more appropriate to employ a method which satisfies the terms of "ordinary" and "annually" by looking to statistics regarding the elevations the river usually reaches during approximately each year over a sufficient period of time in which to support a reasonable finding of what is the ordinary high water stage. This is not to say that the plaintiffs' argument and evidence is not without merit in fixing the limits of the river's action on its banks by use of bank profiles and vegetation studies. But the court believes that PPG's utilization of evidence

relating to the mean high water for purposes of determining *ordinary high water* more properly conforms to the definition supplied and adhered to by the Louisiana Supreme Court over many years.

Essentially mean high water is derived from averaging the annual river stage peaks at a given location. Dr. Richard Kesel, a fluvial gemorphologist [sic], calculated that the mean high water at Shingle Point of 11 feet will recur on an average of once every 1.5 years. This of course means that there is a 75 percent chance that the river will reach the mean high water level in any given year. This comports with definition of "the highest stage that the river usually reaches in any given season of the year." The overwhelming weight of the expert testimony supports a finding that at the time of the respective appropriations and some years before the mean high water at Shingle Point was 11.0 feet. Accordingly, the court adopts 11.0 feet as the ordinary high water stage.

With respect to the elevation of Shingle Point several years prior to the time the work on the borrow pits was first begun in 1984, the maximum elevation shown on Shingle Point on the Mississippi River Hydrographic Survey 1973-1975 was 10.8 feet. The other elevations shown are 10.2, 7.2, 9.3, 6.9, 7.7, 6.1, 8.7, 8.4, and 9.5, which reflect all elevations below the 11.0 feet mean annual high water or ordinary high water stage. Joint Exhibit 5. Immediately before the work was commenced, the Corps of Engineers recorded twenty-five elevations across the surface of Shingle Point and of these twenty-five elevations, only two exceeded 11.0 feet. The remaining elevations are as follows:

> The remaining twenty-three elevations are as follows: 8.7, 8.9, 10.2, 8.2, 6.7, 8.7, 8.3, 11.0, 10.8, 9.6, 8.0, 10.5, 7.7, 5.5, 6.2, 8.2, 7.20, 8.10, 6.97, 9.2, 9.2, 9.3 and 8.0.

Based on this elevation data, Curtis Barrett, defendant's witness, testified that the surface of Shingle Point is 97 percent inundated when the water reaches the 11.0 stage.

He further testified that the only other areas not inundated appeared to be isolated high spots created by man-made activity. As pointed out earlier in this opinion, the court viewed Shingle Point at the conclusion of the trial when the river was at 8.5 level, and, with the exception of a few high spots on the upriver portion, water covered the area with only the tops of trees rising above the waters. Dr. Kesel testified that, "mean high water, that we defined at roughly about eleven feet, covers the bar." (Shingle Point).

It is thus evident, that if mean high water is one and the same as the ordinary high water stage, all of Shingle Point is batture and, therefore, exempt from the payment of compensation under constitutional and statutory authority. Accordingly, plaintiffs' claims are denied and their respective suits are dismissed at their cost. The expert witness fees of the following experts are fixed and taxed as costs: Dr. Richard Kesel – $1,500; Dr. Lowell Urbatch – $1,500; Curtis Barrett – $1,500; Wilton Dufrene – $750; Dr. Luther F. Holloway – $1,500; Dr. William Patrick – $1,500; Dr. Chester C. Watson – $1,500; Max Derbes – $1,500; Hugh B. McCurdy, Jr. – $750; and Irvington Epling – $1,500. A formal judgment will be signed consistent with these written reasons for judgment.

Baton Rouge, Louisiana, this 24th day of June, 1991.

/s/ Lewis S. Doherty III
Lewis S. Doherty III
Judge ad hoc
25th Judicial District Court

APPENDIX "D"

WARREN DeSAMBOURG, ET AL
versus
BOARD OF COMMISSIONERS
FOR THE GRAND PRAIRIE
LEVEE DISTRICT

CONSOLIDATED WITH

ALBERT L. SCHELL, JR., ET AL
versus
BOARD OF COMMISSIONERS
FOR THE GRAND PRAIRIE
LEVEE DISTRICT

CONSOLIDATED WITH

SADIE PERINO, ET AL
versus
BOARD OF COMMISSIONERS
FOR THE GRAND PRAIRIE
LEVEE DISTRICT

CONSOLIDATED WITH

CHARLES MANCUSO, ET AL
versus
BOARD OF COMMISSIONERS
FOR THE GRAND PRAIRIE
LEVEE DISTRICT

CONSOLIDATED WITH

JOSEPH SEIBERT, SR., ET AL
versus
BOARD OF COMMISSIONERS
FOR THE GRAND PRAIRIE
LEVEE DISTRICT

NO. 91-CA-2104
c/w
NO. 91-CA-2105
c/w
NO. 91-CA-2106
c/w
NO. 91-CA-2107
c/w
NO. 91-CA-2108
c/w
NO. 91-CA-2109
c/w
NO. 91-CA-2110
c/w
NO. 91-CA-2111
c/w
NO. 91-CA-2112
c/w
NO. 91-CA-2113

COURT OF
APPEAL,

FOURTH
CIRCUIT

STATE OF
LOUISIANA

CONSOLIDATED WITH

MARIE ELENA MELERINE,
WIFE OF/AND ANTHONY LA
GRECO, JR.
versus
PLAQUEMINES PARISH
GOVERNMENT

CONSOLIDATED WITH

SALVADORE DI CARLO
versus
PLAQUEMINES PARISH
GOVERNMENT

CONSOLIDATED WITH

EMILE LA GRECO
versus
PLAQUEMINES PARISH
GOVERNMENT

CONSOLIDATED WITH

JOSEPH LA GRECO
versus
PLAQUEMINES PARISH
GOVERNMENT

CONSOLIDATED WITH

HENRY G. HEIER
versus
PLAQUEMINES PARISH
GOVERNMENT

APPEAL FROM THE 25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES
NOS. 26-747, 26-748, 26-765, 26-766, 26-881, 30-301,
30-302, 30-303, 30-305 and 30-999

DIVISION "B"
HONORABLE LEWIS S. DOHERTY, III, JUDGE

* * *

PHILIP C. CIACCIO
JUDGE

* * *

(Court composed of Judges Philip C. Ciaccio, Charles R. Ward and Joan Bernard Armstrong)

Armstrong, J. Dissents

MACK E. BARHAM
ROBERT E. ARCENEAUX
MATTHEW K. BROWN
Barham & Arceneaux
New Orleans, Louisiana
Attorneys for Appellants

NOV 13 1992

NORMAND F. PIZZA
M. ALLYN STROUD
Brook, Morial, Cassibry, Pizza & Adcock
New Orleans, Louisiana
Attorneys for Appellee

AFFIRMED

Warren deSambourg, et al., v. Plaquemines Parish Government

Nos. 91-CA 2104 - 2113, Wang No. 1504M

In these consolidated cases, the plaintiff landowners appeal a trial court judgment dismissing their suits against the defendants, The Board of Commissioners for the Grand Prairie Levee District and Plaquemines Parish Government. We affirm.

The trial judge, in well-worded reasons for judgment, set forth the facts of this case, the issue in dispute, the applicable law and its historical development. His reasons for judgment are as follows:

> Eleven consolidated suits form the basis of claims by various riparian owners of lands located along the Mississippi River in Plaquemines Parish. The plaintiffs contend that they are entitled to compensation for the taking of their property for levee purposes. The defendant, Plaquemines Parish Government ("PPG"), contends that it is not liable to pay compensation because the plaintiffs' land lies between the levee and the river and is "batture" and, consequently, under the provisions of the Louisiana Constitution of 1974 and state statutes is exempt from the ordinary requirement that the payment of compensation is due when the property is appropriated by public authorities for levee improvement purposes. The issue thus presented is: What is the scope of the batture exemption and its application to the facts of the case here under consideration.
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> Pursuant to the Mississippi River Flood Control Act of 1928, 33 USC Sec. 701-09, the United States Corps of Engineers ("COE") oversees and maintains the Mississippi River and levee system in Plaquemines Parish. Improvements to or enlargements of the levees are initiated and supervised by the COE in cooperation with the PPG. Once the COE selects the site to improve the levee, the PPG is then obligated to furnish

all needed rights of way and to appropriate[1] riparian property for these purposes.

FACTS

The land in question known as "Shingle Point" consists of approximately fifty acres lying between the edge of the Mississippi River and the levee on the left descending bank of the river at English turn. There are no buildings on Shingle Point, and there has been no agricultural activity carried on in recent history. The alluvial buildup of the river at this point has served as a mining operation for dirt for levee development during the past 100 years or so. At the conclusion of the trial on March 22, 1991, the Court inspected the site. The river was at high water and, except for the upriver end of the tract, very little but willow trees were exposed above the river's waters.

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LAW

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protect their lands from the seasonal ravages of flooding. There was no reimbursement from the state for their expense in making these improvements. However, the burden proved to be too great and the levee districts were created in the late 1800's to construct and maintain the levees in each of their respective levee districts. See Constitution of 1879, Arts. 213-15; La. Acts 1879, No. 33 and La. Acts 1882, No. 10. The creation of the levee districts free the landowners of the obligation of constructing their levees, but it did not free their land from the riparian levee servitude which was created in Article 13 of the Civil Code of 1808 and continued through Article 661 of the Code of 1825 and the Code of 1870, now finally appearing in the 1977 revision of the property articles as Article 665. See 2 Yiannopolous Civil Law Treatise – Property at 169 (2d Ed. 1980).

Presently, Article 665 provides:

> Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.
>
> All that relates to this kind of servitude is determined by laws or particular regulations.

For the first time, Louisiana Constitution of 1898 imposed a requirement that lands appropriated by the Orleans Levee Board would have to pay for lands appropriated by them for levee purposes. Article 312 of the 1898 Constitution. This requirement was extended statewide by the

Constitution of 1921. Article 16, Section 6 provided that all lands and improvements used or destroyed for levee purposes "shall be paid at a price not to exceed the assessed value of the preceding year, provided that this shall not apply to batture;. . . . "

The Constitution of 1974 made a significant adjustment of the levee servitude. Yiannopolous, *supra*, at 172. Article VI, Section 42 of the Louisiana Constitution of 1974 provides:

> Notwithstanding any contrary provision of this Constitution, lands and improvements thereon hereafter actually used or destroyed for levee or levee drainage purposes shall be paid for as provided by law with the exception of batture or property the control of which is vested in the State as in a political subdivision for the purposes of commerce.

This section authorized the Legislature to provide a method of payment for property used or destroyed for levee purposes. The previous limitation on compensation (the assessed value for the preceding year) was continued in effect as a statute by La. Const. Art. XIV, Sec. 16 (1974) subject to change by law. *Board of Com'rs v. Percle*, 535 So.2d 1240 (La. App. 3rd Cir. 1988).

The Legislature thereafter implemented the constitutional provision with respect to compensation to be paid to owners of riparian lands by enacting Act 314 of 1978 by changing the measure of payment from assessed value to fair market value. More specifically, Act 785 of 1985, now contained in LSA-R.S. 38:301(C)(1)(a) declares:

> All lands, exclusive of batture, and improvements hereinafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

Although the riparian landowner still owes the legal servitude of Civil Code article 665, the public (i.e. state, levee board) can no longer exercise that servitude without payment of just compensation which is fair market value. *Tenneco Oil Co. v. Board of Com'rs*, 567 So.2d 113 (La. App. 4th Cir. 1990). But, it must be observed that the legislature maintained the 1974 constitutional provision by exempting "batture" from the mandate to compensate the landowner.

BATTURE

That the lands appropriated are batture and exempt from the payment of compensation is the heart of the PPG's defense to plaintiffs' claims. The term "batture" is not defined by the Louisiana Constitution of 1974, but Acts 1979, No. 676 provided that "Batture" as used in this section shall have the same meaning as that term was defined by the courts of this state as of the effective date of the Louisiana Constitution of 1974," and La. R.S. 38:281(1) now contains an identical provision. In utilizing the term "batture" in the Louisiana Constitution of 1974, it is apparent to the writer that the delegates to the convention believed that "batture" included all of the land resting on the unprotected side of the levee and were unaware of the jurisprudence which reflected that some of those lands

may not consist entirely of batture.[4] Transcript, La. Const. Conv. of 1973, Vol. VIII, 11/8/83, pp. 2205-2208.

In *Boyce Cottonseed Oil Mfg. Co. v. Bd. of Comm'rs*, 160 La. 727, 107 So. 506 (1926), the court provided a jurisprudential definition as follows:

> The batture is that part of the riverbed which is uncovered at the time of ordinary high water; when it ceases to be covered at the time of ordinary high water, it ceases to be batture and becomes the bank of the river.

Professor Yiannoupoulos in his Louisiana Civil Law Treatise, Vol. II, Sec. 57, observed that "For purposes of interpretation of Article 665 of the Louisiana Civil Code and Article 16, Section 6 of the Louisiana Constitution of 1921, the Louisiana Supreme Court has consistently defined batture as the area between ordinary low and ordinary high state of the water of a navigable river." *Id.* at 175. Professor Yiannoupoulos went on to say: "That is, of course, the definition of the natural bank of the river, as distinguished from the definition of the second paragraph of Article 457 of the 1870 Code. Thus levee boards were, and continue to be, bound to pay on indemnity for land between the ordinary high water mark and a levee actually used or destroyed for levee purposes." The definition thus supplied in *Boyce, supra,* leads to an inquiry as to what is the ordinary high water stage of a navigable stream and how is it determined.

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[4] Thus the constitution and R.S. 38:301 requires payment at fair market value for that portion of the bank taken which is not batture, *Tenneco Oil Co., supra.*

The Louisiana Supreme Court in *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922), declared the "ordinary high water stage" as being "the highest stage that it (the river) usually reaches at any season of the year. . . . " However, the "ordinary high water mark does not necessarily encompass the peak flow or flood stage." *Buttery v. U.S.*, 575 F.Supp. 283 (E.D. La. 1983). Also *Oklahoma v. Texas*, 260 U.S. 626, 43 S.Ct. 221, 67 L.Ed. 428 (1923).

The petitioners assert that the ordinary high water stage should be determined from the examination of the physical characteristics of the bank and, in some instances, where the physical characteristics are not clearly identifiable, resort should be made to examination of the types of vegetation which exist in a hydrographic environment. On the other hand, the defendant submits that ordinary high water state is the levee which restrains the river at its highest stage if the levee is in "proximity" to the river[5] and, if not, the stage should be determined by looking to the mean annual high water, which they submit exceeds the land elevation of Shingle Point. The foundation of plaintiffs' argument is centered more on federal regulations and jurisprudence, whereas the defendant's argument is primarily based on how the term is employed in Louisiana cases. The court will agree with PPG's assertion that the federal regulations define river bed and ordinary high water with respect to the federal government's navigational servitude which is different from the Louisiana cases which deal

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[5] (La. Civ. Code art. 456)

with the public's 665 servitude and the rights of the riparian landowner.

In making a determination as to what method would be proper, this court must resort to the guidelines established by the two cases, *Wemple* and *Boyce, supra. Wemple,* which has been consistently cited with approval by the Louisiana Supreme Court and by lower appellate courts, specifically identifies the ordinary high stage as being "the highest stage that the river *usually* reaches at any season of the year. . . . " Webster defines "usual," among other things, as "found in ordinary practice or in the ordinary course of events." *Webster's Ninth New Collegiate Dictionary,* Merriam-Webster, Inc. (1983). *Boyce, supra,* utilizes the term "annually" in incorporating ordinary high water as the upper boundary of batture. In the court's opinion, it is more appropriate to employ a method which satisfies the terms of "ordinary" and "annually" by looking to statistics regarding the elevations the river usually reaches during approximately each year over a sufficient period of time in which to support a reasonable finding of what is the ordinary high water stage. This is not to say that the plaintiffs' argument and evidence is not without merit in fixing the limits of the river's action on its banks by use of bank profiles and vegetation studies. But the court believes that PPG's utilization of evidence relating to the mean high water for purposes of determining *ordinary high water* more properly conforms to the definition supplied and adhered to by the Louisiana Supreme Court over many years.

Essentially mean high water is derived from averaging the annual river stage peaks at a

given location. Dr. Richard Kesel, a fluvial geomorphologist, calculated that the mean high water at Shingle Point of 11 feet will recur on an average of once every 1.5 years. This of course means that there is a 75 percent chance that the river will reach the mean high water level in any given year. This comports with definition of "the highest stage that the river usually reaches in any given season of the year." The overwhelming weight of the expert testimony supports a finding that at the time of the respective appropriations and some years before the mean high water at Shingle Point was 11.0 feet. Accordingly, the court adopts 11.0 feet as the ordinary high water stage.

With respect to the elevation of Shingle Point several years prior to the time the work on the borrow pits was first begun in 1984, the maximum elevation shown on Shingle Point on the Mississippi River Hydrographic Survey 1973-1975 was 10.8 feet. The other elevations shown are 10.2, 7.2, 9.3, 6.9, 7.7, 6.1, 8.7, 8.4, and 9.5, which reflect all elevations below the 11.0 feet mean annual high water or ordinary high water stage. Joint Exhibit 5. Immediately before the work was commenced, the Corps of Engineers recorded twenty-five elevations across the surface of Shingle Point and of these twenty-five elevations, only two exceeded 11.0 feet. The remaining elevations are as follows:

> The remaining twenty-three elevations are as follows: 8.7, 8.9, 10.2, 8.2, 6.7, 8.7, 8.3, 11.0, 10.8, 9.6, 8.0, 10.5, 7.7, 5.5, 6.2, 8.2, 7.20, 8.10, 6.97, 9.2, 9.2, 9.3 and 8.0.

Based on this elevation data, Curtis Barrett, defendant's witness, testified that the surface of

> Shingle Point is 97 percent inundated when the water reaches the 11.0 stage.
>
> He further testified that the only other areas not inundated appeared to be isolated high spots created by man-made activity. As pointed out earlier in this opinion, the court viewed Shingle Point at the conclusion of the trial when the river was at 8.5 level, and, with the exception of a few high spots on the up river portion, water covered the area with only the tops of trees rising above the waters. Dr. Kesel testified that, "mean high water, that we defined at roughly about eleven feet, covers the bar." (Shingle Point).
>
> It is thus evident, that if mean high water is one and the same as the ordinary high water stage, all of Shingle Point is batture and, therefore, exempt from the payment of compensation under constitutional and statutory authority.

It is well settled than an appellate court must give great weight to the conclusions reached by the trier of fact, and if there is a conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed unless manifestly erroneous. *Arceneaux v. Domingue,* 365 So.2d 1330 (La. 1978).

In the instant case, both plaintiffs and defendants introduced testimony of several experts relevant to the issue of what is the ordinary high water mark of the Mississippi River. Dr. Luther F. Holloway testified on behalf of plaintiffs. Dr. Holloway, an expert in the field of plant pathology and botany, testified regarding the physical ordinary high water mark at Shingle Point. According to Dr. Holloway, in determining the ordinary high water

mark the dominance of the stream on the bed bank profile in relation to the soils and vegetation along the bank during all periods of water flow must be observed. Holloway testified that determining the high water mark is not an averaging technique and that high water mark is usually seen because it is a very distinct physical phenomenon, as evidence by the break in vegetation on the river bank. He further stated that based on his observations there is a natural demarcation line or physically visible high water mark that extends across Shingle Point. While testifying, Dr. Holloway analyzed pertinent gauge data. He opined that occasions on which river elevations reached 11.0 feet at Shingle Point should be characterized as "high, high flood events."

Dr. Chester Watson, a member of the Civil Engineering Faculty at Colorado State University, testified as an expert in river hydrolics and sediment transport for the plaintiffs. Like Dr. Holloway, Dr. Watson testified that the most reliable way to determine the ordinary high water line of the river is to observe the physical evidence at the particular site. According to him, the physical fact evidence of a significant mark on the river bank integrates all of the flows of the river that occur during a specific period and not just the river flow at peak elevations. At trial Dr. Holloway testified that he used a transect, as did Dr. Holloway [sic] when he examined the area at Shingle Point to determine the high water mark of the river. He characterized the visible mark across the surface at Shingle Point as a debris line whereas Dr. Holloway referred to it as an erosion line, but both agreed it was a clear delineation.

Also testifying for plaintiffs was Dr. William Patrick, Boyd Professor of Coastal Sciences at Louisiana State University. Dr. Patrick, testifying as an expert in soils, sediments, wetlands and riverine soils and sediments, testified regarding the use of sediment distribution to determine the ordinary high water line of the river. He stated that, generally, above a certain point on the bank, the sediments or the soils are stabilized because the water fails to rise to that level often enough to destabilize or scour out the soils. Consequently, plants and vegetation take root due to the sedimentation and this growth clearly delineates the river's ordinary high water stage from its low water stage. According to Dr. Patrick, four factors [were] analyzed in determining where the river's ordinary high water stage. 1) the grain size distribution; 2) the soil's organic matter content; 3) the sediment layers; and, 4) the presence of leaves in between these layers. He further testified the characteristics of the zone above the ordinary high water line at English Turn were that the soil was stable, the grain size was finer, the plants were more stable to proliferate their roots throughout the zone and the organic matter content of the soil was high. Dr. Patrick stated that the vegetation and tree species found at Shingle Point do survive annual inundation by the river. He found that at English Turn the zone above the ordinary high water mark began at 8.6 elevation. Like Drs. Holloway and Watson, he also testified that the ordinary high water line was clearly visible by observing the physical characteristics of the area.

In refuting plaintiffs experts' testimony that the ordinary high water mark is best determined by observing the physical markings at Shingle Point, defendants'

experts claimed it is more accurately determined by calculating the mean annual high of the river. Defense witness, Curtis Barrett, qualified as an expert hydrologist and civil engineer, testified that the mean annual high water, derived from averaging the annual river stage peaks at a given location is used by the United States Corps of Engineers as a variable to describe the normal upperbound of a river and its behavior. Dr. Richard Kesel, an expert in fluvial geomorphology and sediment transport testifying for the defendants, stated that while the term ordinary high water is not often used in the scientific literature and is considered a legal term, mean high water (the annual average high) is more often used in the technical realm.

Dr. Kesel testified extensively regarding his historical investigation of both land elevations and river stage elevations at Shingle Point. He characterized Shingle Point as a "point bar," which he defined as an accumulation of sediment on the inside of a meander bend. In analyzing the effects of the flow of the Mississippi River waters on the land surface of Shingle Point, Dr. Kesel testified that he studied several sources of information, including: historical maps prepared in connection with Mississippi River Commission hydrographic surveys in 1883, 1921, 1935, 1949-52, 1962, 1966 and 1975; aerial photographs of Shingle Point taken by the U. S. Government in various years between 1947 and 1989; and, river gauge data, compiled by the Corps of Engineers from Mississippi River gauges at Carrollton, Chalmette and Braithwaite. According to Dr. Kesel, based on his studies he concluded that the maximum land elevations at Shingle Point varied over time due to the action of the river depositing and

removing sediments therefrom, and in more recent decades due to man-made activity. He further concluded that throughout recorded history, the annual high water elevations of the river exceeded the highest land elevations on Shingle Point. Both Dr. Kesel and Barrett testified at trial that they analyzed river gauge records and reached the conclusion that, on average, the highest stage that the river reaches at Shingle Point in any given year is approximately 11.0 ft. Based on elevational data, Barrett testified that over ninety-seven percent of the surface of Shingle Point is inundated when the river reaches the 11.0 feet stage. Like Barrett, Dr. Kesel testified that ninety-eight to ninety-nine percent of the surface is inundated when the river reaches the 11.0 feet stage and that the areas not inundated at this stage are isolated high spots created by man-made activity.

The law is well settled that where the testimony of expert witnesses differs, the trier of fact has great discretion in determining the credibility of the evidence, and a finding of fact in this regard will not be overturned unless clearly wrong. *A. Copeland Enterprises v. Harimaw, Inc*, 528 So.2d 707 (La. App. 5th Cir. 1988), *writ denied* 531 So.2d 475 (La. 1988). In the instant case both plaintiffs' and defendants' experts were equally qualified and the trial judge's reliance on the testimony of defendants' experts was a proper exercise of his discretion. After reviewing the record, we find the trial judge's findings of fact and conclusions of law are amply supported by the evidence. We find no error in his conclusion that all of Shingle Point was batture and, thus, exempt from the payment of compensation under constitutional and statutory authority.

Accordingly, the judgment of the trial court in favor of defendants dismissing plaintiffs' suits is affirmed.

AFFIRMED

WARREN deSAMBOURG, ET AL	* No. 91-CA-2104
	* COURT OF APPEAL
VERSUS	* FOURTH CIRCUIT
PLAQUEMINES PARISH GOVERNMENT	* STATE OF LOUISIANA
	*

* * *

Armstrong, J., respectfully dissents.

APPENDIX "E"

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 087

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the *2nd day of September, 1993,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING DENIED:

* * *

93-C - 0167 WARREN DeSAMBOURG, ET AL v. BOARD OF COMMISSIONERS FOR THE GRAND PRAIRIE LEVEE DISTRICT AND OTHER CONSOLIDATED CASES (Parish of Plaquemines)
MARCUS, J. – not on panel.
DENNIS, J. – would grant a rehearing.
WATSON, J. – would grant a rehearing.
LEMMON, J. – would grant a rehearing.

APPENDIX "F"

The petitions of Warren and Mary DeSambourg, Albert and Rosalie Schell, Sadie, Joseph and Joann Perino, Charles and Angelina Mancuso, and Joseph and Mary Seibert, all contain the following allegations:

> The United States Constitution, the Louisiana Constitution of 1974, and the Louisiana Revised Statutes, including, but not to the exclusion of other statutes, Acts 1978 No. 314, Acts 1979 No. 676, and LSA.R.S. 38:301, *et seq.* require that petitioners shall be paid fair market value to the full extent of the loss and just compensation for both the land and improvements taken or destroyed and for damages suffered by reason thereof.
>
> * * *
>
> Notwithstanding any Louisiana law to the contrary, petitioners further assert that should any part of their lands taken be found to be "batture" such lands are protected from being taken without payment of just compensation and damages, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Louisiana law set forth in Acts 1978, No. 314, and Louisiana law as set forth in Acts 1978, No. 314.

The petitions of Anthony and Marie LaGreco, Salvadore DiCarlo, Emile LaGreco, Joseph and Linda Ann LaGreco, and Henry and Erica Heier, all contain the following allegation:

> The defendant's taking of the material and trees and timber described in Paragraph 3, constitutes an illegal taking of the plaintiffs' land

which has deprived plaintiffs of the fruits and revenues of their property in violation of the guarantee of due process provided by the State of Louisiana Constitution of 1974, Article 1, section 2, and the Fourteenth Amendment of the United States Constitution and the guarantee against the taking of private property without just compensation provided by the Fifth Amendment of the United States Constitution.

APPENDIX "G"

The federal issue raised in this petition for *certiorari* was first addressed by plaintiffs in their pre-trial memorandum, where they urged the court to accept the definition of "ordinary high water" employed throughout the United States:

> Because of its factual nature, the term "ordinary high water" has no "immutable definition." *United States v. Cameron*, 466 F.Supp. 1099 (Fla. 1978). However, the ordinary high water stage of the water does inevitably leave its mark. *Id.* Thus, as recognized by the Corps of Engineers and every jurisdiction that has ever addressed the question, "ordinary high water" must be determined with reference to the physical characteristics of the banks of a navigable river. The leading definition emphasizes the importance of physical characteristics:
>
> > T[he ordinary high water line] is to be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.
>
> *Howard v. Ingersoll*, 13 How. 381, 54 U.S. 381, 427, 14 L.Ed. 189 (1851) (Curtis, J., concurring). *See also State v. Richardson*, 72 So. 984 (La. 1916) (analyzing "bank full stage" and "ordinary stage of high water" in relation to physical characteristics of the bank). Thus, the place of ordinary high water is where the presence and action of the water is so continuous as to leave a distinct

> mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristics. *Wisconsin v. Trudeau*, 408 N.W.2d 337 (Wisc. 1987); *Belmont v. Umpqua Sand & Gravel, Inc.*, 542 P.2d 884 (Oreg. 1975); *Hayes v. Arkansas*, 496 S.W. 2d 372 (Ark. 1973); *Wisconsin v. McDonald Lumber Co.*, 118 N.W.2d 152 (Wisc. 1962).

Plaintiffs' Pre-Trial Memorandum, at 15. In that pleading, plaintiffs also responded to the contention that the district court should not rely on federal cases:

> PPG also argues that this Court should be wary of relying on "federal" cases determining the point of "ordinary high water" because "federal regulations define river bed and ordinary high water in a manner radically different from the definitions employed under Louisiana law." PPG's Pre-Trial Memorandum at 25. The implication is that federal cases cannot be applied because under the federal law, the "bed" is everything below ordinary high water, while under "civil law" the "bed" is below ordinary low water, and the "bank" is between ordinary low and ordinary high (PPG equating "batture" with "bank"). But, in the much touted and relied upon *Boyce* decision, PPG's seminal case, the court defined "bed" as all that is below ordinary high water. *See* Pre-Trial Memorandum at 18-19. PPG even goes so far as to recast the language of *Boyce* by updating its use of "bed" and "bank" into modern parlance. Interestingly, PPG only selectively recognizes that the determination of the location of ordinary high water is not dependent upon the meaning a court attached to the terms "bed" and "bank."

Id., at 14, n. 7.

The federal issue was next addressed at the district court level after trial, where plaintiffs argued the following:

> [D]efendant's position that the ordinary high water mark discussed by plaintiffs' experts is somehow foreign to the "civil law" of Louisiana is patently erroneous. This is evident from the simple fact that Louisiana, like every other one of the 50 states, acquired, as sovereignty lands, under the equal footing doctrine, all lands located "below the ordinary high water mark of navigable bodies of water" within its boundaries. *State v. Placid Oil Company*, 300 So.2d 154, 172 (1974) (*on reh'g*). Because of the State's decision to treat rivers and lakes differently, Louisiana gave the bank, i.e., the land between the ordinary high and ordinary low water, to riparian landowners, but where lakes are concerned, "the State has never ceded and still holds, the land below the ordinary high water mark." *Id.* Thus, the "ordinary high water mark" is the same mark in all 50 states, because it is the mark that arose as a result of the State's acquisition of sovereignty lands from the federal government upon entry into the Union.

Plaintiffs' Post-Trial Memorandum, at 23, n. 18.

APPENDIX "H"

The federal question raised herein was first raised before the Louisiana Court of Appeal for the Fourth Circuit, in plaintiffs' opening brief:

> Louisiana, the federal government and all other states must define "ordinary high water" in the same way as a necessary consequence of the manner in which Louisiana and the other 49 states obtained title to the land underlying navigable waterways when they entered the Union. It is beyond dispute that all 50 states acquired all land lying below the ordinary high water mark of navigable water bodies within their boundaries by virtue of their inherent sovereignty when those states became a part of the Union. *See, e.g., Ramsey River Road Property Owners v. Reeves*, 396 So.2d 873, 875 and n.2 (La. 1981) (discussing Equal Footing Doctrine); *Pollard v. Hagan*, 44 U.S. 212, 3 How. 212, 11 L. Ed. 565 (1845). One writer describes the legal basis of the rule as follows:
>
> > It has been held that the United States never owned or had title to navigable waters and the soils beneath the same. This holds true as to the 13 original states, but with respect to states created out of ceded territory, the rule is the United States acquired and held such navigable waters and the beds thereof in trust for the future states.
>
> John L. Madden, *Federal and State Lands in Louisiana*, 325 (1973).
>
> There is no basis, however, for concluding that Louisiana's "civil" law changed the scope of Louisiana's acquisition. Rather, that same

author observes that Louisiana jurisprudence "as it applies to state ownership of navigable waters and the soils beneath them, has followed closely and almost precisely the jurisprudence of the Supreme Court of the United States on the subject." Madden at 325-326. Any deviations from the jurisprudence of the Supreme Court of the United States do not represent actual conflicts, but reflect, instead, the unique codal, statutory, constitutional and policy provisions made in Louisiana as to the nature of navigable water **beds**, all of which occurred **following** Louisiana's acquisition of such lands in 1812. In short, Louisiana ceded a portion of its ownership to the riparian owners by giving them ownership of the land **below** the "ordinary high water" that marked the upper boundary of the state's sovereign ownership. However, Louisiana could not change the location of the upper boundary – civil law or not. This same sort of state alteration of ownership rights has also occurred in other states, but in all states, "ordinary high water" is the term used to denote the upper boundary of original state sovereignty. *See, e.g., Theisen v. Gulf, F. & A. Ry. Co.*, 78 So. 491, 500 (Fla. 1917). Moreover, various Louisiana statutes also employ the term "ordinary high water" in a way that shows that there is no difference in Louisiana's use of the term. *See, e.g.*, La. Rev. Stat. § 30:2091 (Mississippi River Interstate Pollution Phase-Out Compact).

Louisiana's long-standing jurisprudential recognition that in 1812 Louisiana took title to all lands lying below the ordinary high water mark of all navigable water bodies, but then ceded title of the land between the ordinary high and low water marks to the riparian owner

was recently reiterated by the First Circuit Court of Appeal as follows:

> Upon admission to the United States in 1812, Louisiana, because of its inherent sovereignty, acquired title to all lands within its boundaries below the ordinary high water mark of navigable bodies of water. [Citation omitted.] As to navigable rivers and streams, the State still holds in its sovereign capacity all land below the ordinary low-water mark, but the banks (the areas between the ordinary low-water and ordinary high-water marks) now belong to the riparian landowners.

McCormick Oil & Gas Corp. v. Dow Chemical Co., 489 So.2d 1047, 1049 (La. App. 1st Cir. 1986). *Accord State v. Placid Oil Co.* 300 So.2d 154, 173 (La. 1974).

Thus, the PPG's contention that the Louisiana approach to determination of ordinary high water, based upon the "civil law," is somehow different from the prevailing national approach is simply not true. In fact, the PPG's whole argument is entirely off base because American law on the question of riparian landowner's rights over the banks of navigable streams follows the Roman Civil Law, not the English Common law. Under the common law, the riparian landowner owned the beds of all rivers and streams that were not tidewaters up the center line. Under Roman law, which was adopted by the United States Supreme Court and which was made applicable to all of the state's under the equal footing doctrine, the sovereign owned the beds of all navigable rivers and streams from

> ordinary high to ordinary high. *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 51 So. 706, 708-709 (La. 1910), and cases cited therein. Thus, the federal and state decisions cited by the Landowners are applications of a Roman civilian heritage that is shared by all states and by Louisiana on this issue – there is nothing "unique" about Louisiana in its approach to the question of "ordinary high water." Only under the PPG's formulation is Louisiana unique because it would be the only state that would equate "ordinary high water" with "average mean extraordinary high water."
>
> Accordingly, the trial court was simply wrong to conclude that the Landowners' evidence of "ordinary high water" should be ignored because general American law defines "ordinary high water" differently than does Louisiana. "Ordinary high water" on a navigable river is the same in Portland, Peoria or Plaquemines Parish. The court's equation of "ordinary high water" with "average mean [extraordinary] high water" is just as wrong here as it would be anywhere else.

Brief of Appellants, at 38-40.

The plaintiffs argued the following in their reply brief:

> To begin with, the body of law cited by the Landowners and erroneously referred to by the PPG as "common law" did not develop to identify the location of the federal navigational servitude, much less "ship channels." *Howard v. Ingersoll, supra*, the landmark United States Supreme Court water law case that provides the most commonly cited definition of "ordinary

high water," was concerned with much weightier issues – no less than the question of whether public ownership of rivers and streams extended to the ordinary low or ordinary high water mark. (Note omitted.) After extensive discussion of the nature of river borders, the Court concluded that ordinary high water was to be the dividing line because "no scientific exploration" was needed to find its location, which is that place "where the bank is fairly marked by the water, that water level will show at all places where the line is." 54 U.S. at 416, 419. In reaching this conclusion, the Court "reaffirmed the theoretical foundation for the ordinary high water principle: the full stream or lake is owned by the public at large as sovereignty lands and the boundary is located by reference to the mark impressed by the waters at their full or high stage." D. Guest, *The Ordinary High Water Boundary on Freshwater Lands and Streams: Origin, Theory and Constitutional Restrictions*, 6 J. Land Use & Envtl. L. 205 (1991). This hardly sounds like a principle alien to Louisiana. (Note omitted). Indeed, Louisiana jurisprudence "as it applies to state ownership of navigable waters and the soils beneath them, has followed closely and almost precisely the jurisprudence of the Supreme Court of the United States on the subject." Madden, *Federal and State Lands in Louisiana*, 325-26 (1973). In fact, *Howard v. Ingersoll* has been cited twice with favor by the Louisiana Supreme Court, once in the very case upon which the PPG's whole theory of "average annual peak" rests. *See State v. Richardson*, 72 So. 984, 990 (La. 1916); *Wemple v. Eastham, supra*, 90 So. at 638.

Moreover, the PPG's suggestion that the federal navigational servitude defines only the "ship channel" is ludicrous. The very case cited by the PPG as suggesting that the servitude is extremely limited underscores that the servitude extends to the "entire stream and bed [in Louisiana called "bank"] below the ordinary highwater mark." *Gollatte v. Harrell,* 731 F. Supp. 453, 460 (S.D. Ala. 1989), citing *United States v. Rands,* 389 U.S. 121, 123, 88 S. Ct. 265, 267 (1967). In short, the federal navigational servitude extends from bank to bank under Louisiana law (including the batture), but it does not extend to the property at issue, which is above the natural bank and ordinary high water. It is essentially the same as the servitude of public use imposed by Louisiana law upon the banks of rivers under Civil Code Article 456 (1978).

* * *

The only authority cited by the PPG as a purported recognition of its "common law" distinction is on Page 39 of its brief, S. Milan, *Regulation of Batture Pollution and Ecology,* 33 Loy. L. Rev. 921 (1988). The PPG cites this article as standing for the proposition that the "common law" decisions locating the "ordinary high water mark" by physical evidence are only relevant to a determination of the federal government's navigational servitude, and are therefore alien to Louisiana law which follows the PPG's "average annual peak" approach. This is an utter perversion of the author's thesis in that he concludes exactly the opposite. In his article, Mr. Milan argues that the state and federal laws that control the use of batture be employed for pollution control purposes. In pressing this

view, Milan also urges that the definition of batture be expanded to encompass as great an area as possible – from the edge of the river to the toe of the levee. The method urged by Milan for this expansion is adoption of that approach urged by the PPG in this case and accepted by the trial court: "using mathematical averages, rather than select physical markings." However, what the PPG ignores is Milan's explanation as to *why* such a course would be permissible. The following is what is quoted by the PPG, except that in the PPG's brief, the bolded material is conveniently replaced by a series of ellipses.

> [The line on the shore established by the fluctuations of water and indicated by physical characteristics] is a very limiting definition of the lateral extreme of river regulation. In fact, the artificial limitation was a principal reason for the passage of the Clean Water Act, discussed later, which bypassed this limitation of the ordinary high water mark. This narrow definition can be criticized because it was largely borrowed from ordinary high water mark cases dealing with the federal navigation servitude. **In that setting the Corps legally makes use of property, without paying just compensation, within the ordinary high water mark of a navigable waterway for improvement of navigation. In other words, when the Corps can take property without compensation, a narrow limitation on its commerce clause power is certainly proper.**

> **However, there is no legitimate need to adopt [the narrower physical characteristics definition of batture] in the regulatory arena. Regulation simply means that use of an area subjects it to a permit process and a public interest determination. Property is not actually taken in a permit process.**
>
> The concern is expressed here because, as will be shown, most of the batture is inundated by high river several months each year. It would seem that using mathematical averages, rather than select physical markings, could expand RHA regulatory jurisdiction over a greater area of batture.

33 Loy. L. Rev. at 928 (emphasis added). What the PPG seeks to hide from this Court is that Mr. Milan premises his expanded notion of batture (one based on the exact type of mathematical averaging proposed by the PPG) upon the fact that property would not be taken under his pollution control regulatory scheme. Milan states that the "narrower" definition of ordinary high water, based upon physical markings, is "certainly proper" when the taking of property is at issue. Of course, the taking of property is exactly what is at issue in this case. When the taking of the batture is at stake, therefore, Mr. Milan recognizes that the courts of Louisiana, as everywhere, define landowner's rights according to the physical evidence of the natural bank, not the more expansive mathematical averaging urged by the PPG. Indeed, were this not the case, there would have been no need for Mr. Milan's article!

Therefore, the PPG's definition of "ordinary high water" as "average annual peak" cannot be

> sustained on the basis of Louisiana, or any other, law. At the risk of repetition, it bears reiteration that the PPG has not cited **ONE SINGLE CASE** where a court has equated ordinary high water of a river with average annual peak, or used statistics to locate its mark. (Note omitted.)

Reply Brief of Appellants, at 17-21.

The plaintiffs reiterated the federal issue in their Application for Rehearing.

> Louisiana's "ordinary high water" mark cannot differ from that established by the United States Supreme Court or any other state court. Under the equal footing doctrine, all states received the exact same thing from the United States with regard to navigable rivers – the "bed" as it extends from the ordinary high water mark of one bank to the ordinary high water mark of the other bank. Louisiana, uniquely, has chosen to cede to the riparian owners that part of the "bed" from ordinary high water to ordinary low water. In fact, the legal servitude found in the Civil Code is derived directly from this concession of land (ordinary high water to ordinary low water) to riparian owners, the state retaining only that portion of the "bed" from ordinary low water to ordinary low water. Even though Louisiana uniquely calls this ceded land "natural bank" instead of "bed," and uniquely has divested itself of ownership over this area, the location of the place of "ordinary high water" cannot be different in Louisiana from that in any other state because the only claim or title the State of Louisiana ever had to this part of navigable rivers derives directly from the United States. Louisiana could not have given to the riparian

> owners that which it did not receive. By allowing the experts to define "ordinary high water" and thus "batture" as "average annual peak flow," this Court has in effect rewritten the Civil Code! And, it has done so in a manner which flies in the face of all legal precedent on both the state and national level. The holding of this Court and the trial court runs counter to federal law and United States Supreme Court jurisprudence, posing a serious Federal question!

Application for Rehearing, at 3-4.

APPENDIX "I"

The federal question raised in this petition was first raised before the Louisiana Supreme Court in Plaintiffs' Application for Writs of Certiorari. In their "Statement of Writ Grant Considerations" the plaintiffs urged the following:

> B. The lower courts' definition of "ordinary high water" as the equivalent of "average annual peak" water conflicts with provisions of the Civil Code (Civil Code Articles 456 and 665 defining banks), decisions of this Court, other appellate courts and the United States Supreme Court, and causes material injustice by depriving applicants of their constitutional right to just compensation to the full extent of their loss.
>
> * * *
>
> D. The holding in this case conflicts with the United States' sovereignty grant of rivers and their beds to the states under the equal footing doctrine and conflicts equally with the Louisiana grant of the banks of these beds to the private ownership of riparian landowners.

Application for Writs of Certiorari and Review on Behalf of Plaintiffs-Applicants, at v. Also, in their "Summary of Argument" plaintiffs stated the following:

> Louisiana's "ordinary high water" mark cannot differ from that established by the United States Supreme Court or any other state court. Under the equal footing doctrine, all states received the exact same thing from the

> United States with regard to navigable rivers – the "bed" as it extends from the ordinary high water mark of one bank to the ordinary high water mark of the other bank. Louisiana, uniquely, has chosen to cede to the riparian owners that part of the "bed" from ordinary high water to ordinary low water. In fact, the legal servitude of levee found in the Civil Code is derived directly from this concession of land (ordinary high water to ordinary low water) to riparian owners, the state retaining only that portion of the "bed" from ordinary low water to ordinary low water. Even though Louisiana uniquely calls this ceded land "bank" instead of "bed," and uniquely has divested itself of ownership over this area, the location of the place of "ordinary high water" cannot be different in Louisiana from that in any other state because the only claim or title the State of Louisiana ever had to this part of navigable rivers derives directly from the United States. Louisiana could not have given to the riparian owners that which it did not receive.

Id., at 7-8. Finally, plaintiffs' "Argument on Assignments of Error" contains the following:

> Louisiana is not unique in defining "ordinary high water" of a river in relation to its bank as evidenced by physical evidence. The leading national definition of "ordinary high water" was supplied by the United States Supreme Court at a very early date, which was cited with approval by the Louisiana Supreme Court in *Wemple v. Eastam, supra* 90 So. at 638, and *State v. Richardson, supra* 72 So. at 990:
>
> > [Ordinary high water is that place] where the presence and action of waters are so

> common and usual and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.

Howard v. Ingersoll, 54 U.S. (13 How.) 381, 427, 14 L.Ed 189 (1851). (Note omitted.)

The PPG has successfully made much of this "common law" definition, successfully convincing the trial court that Louisiana's "civil law" heritage commands that this definition be rejected. However, the simple truth is that no state, including Louisiana, nor the federal government, defines "ordinary high water" differently. This is a consequence of the "equal footing doctrine," under which the United States admitted each state to the Union under the equal footing of owning the beds of all navigable rivers from ordinary high water to ordinary high water. Louisiana did not acquire more or less than any other state, although Louisiana alone has chosen to grant to its riparian owners that part of the "bed" ("bank" in Louisiana) between ordinary high water and ordinary low water. The important point is that since Louisiana did not get riparian rights beyond "ordinary high water" as defined by the United States, it is folly for the PPG to argue that Louisiana can now claim additional rights by redefining "ordinary high water" more expansively. Louisiana cannot claim more than it got. Thus, it is not surprising that Louisiana jurisprudence "as it applies to state ownership of navigable waters and the soils beneath them, has followed closely and almost precisely the jurisprudence of the

> Supreme Court of the United States on the subject." Madden, *Federal and State Lands in Louisiana*, 325-26 (1973). *Howard v. Ingersoll, supra*, decided in 1851, and in progeny, has not been, and cannot be, ignored.

Id., at 13-14.

In reply to the defendant's opposition to writs, plaintiffs argued the following:

> The PPG's assertion of a purported distinction between Louisiana's civil law and the "common law" regarding the meaning of "ordinary high water" is bogus, and nothing but a poorly contrived red herring. The PPG repeats this contention *ad nauseam* in its brief, but can only offer as support the utterly sophistic argument that the "common law" considers the place of "ordinary high water" to mark the upper boundary of the "bed" of a river, while in Louisiana, it marks the upper boundary of the "bank." But, the fact that Louisiana labels the place of ordinary high water differently from other jurisdictions does not change the location – it just changes the name. Regardless of whether called "bed" or "bank," the location of the "ordinary high water mark" is the same.
>
> It has to be. All states that came into the Union, including Louisiana, acquired property under the equal footing doctrine. Under that doctrine, all states were given river bottoms and, in Louisiana parlance, "banks" up to the line of ordinary high water. *See, e.g., Ramsey River Road Property Owners v. Reeves*, 396 So.2d 873, 875 and n.2 (La. 1981) (discussing Equal Footing Doctrine); *Pollard v. Hagan*, 44 U.S. 212, 3 How. 212, 11 L. Ed. 565 (1845). The PPG cannot

seriously contend that Louisiana would have been treated any differently in this regard. Louisiana treated its property owners differently only because it granted private ownership below the ordinary high water line down to low water, in direct contrast to most other states. But, Louisiana could not have given away that which it did not receive from the United States.

While the civilian lawyer's knee jerk reaction to labelling an argument as a "common law" argument may be to reject that argument, the "common law" cannot be any different from the "civil law" on this point, because, in fact, the general American "common law" of rivers and banks is derived from the same Roman law that gave rise to the French, Spanish, and Louisiana "civil law." (Note omitted.) Thus, the law of all fifty states on the issue of ordinary high water is necessarily the same. The vocabulary changes occasionally as with the use of the word "bed" as opposed to "bank," but the physical location of the thing that these terms describe does not. This location cannot be different because if "equal footing" means anything it means that each state was given the same identical rights with regard to the navigable rivers.

Reply to Opposition to Writs, at 6-7.

Following the granting of writs, the plaintiffs argued in the "Summary of Argument" section of their opening brief, the following:

"Ordinary high water" has been consistently and universally defined in light of the physical mark that these waters leave upon the character of the bank in terms of vegetation, soil, elevations, and topography. This is the definition of

> "ordinary high water" that has been adopted by the United States Supreme Court and made applicable to all states by the "equal footing" doctrine, since each state received no more than this part of the navigable waters of the United States upon its admission to the Union.

Original Brief on Behalf of Plaintiffs-Applicants, at 6. That premise was developed in the Argument Section of Plaintiffs' brief, as follows:

> *Every* jurisdiction, including Louisiana, that has ever considered the question has followed the *Howard v. Ingersoll, supra,* determination of "ordinary high water." This is a consequence of the "equal footing doctrine," under which the United States admitted each state to the Union with a grant of the land under the navigable rivers and streams, from ordinary high to ordinary high. *See, e.g., Ramsey River Road Property Owners v. Reeves,* 396 So. 2d 873, 875 and n.2 (La. 1981) (discussing equal footing doctrine); *Pollard v. Hagan,* 44 U.S. 212, 3 How. 212, 11 L. Ed. 565 (1845). Since every state was granted the beds of navigable rivers, from "ordinary high" to "ordinary high," that grant being exactly equal in every state, it would be an unconstitutional taking for some states to simply increase the size of their grant by redefining "ordinary high water." (Note omitted.)
>
> There is nothing unique about Louisiana which excepts it from this rule. Louisiana did not acquire more or less than any other state, although Louisiana has chosen to grant to riparian owners that part of the "bed" ("bank" in Louisiana) between ordinary high water and ordinary low water. (Note omitted.) *McCormick Oil & Gas Corp. v. Dow Chemical Co.,* 489 So. 2d

1047, 1049 (La. App. 1st Cir. 1986). *Accord State v. Placid Oil Co.*, 300 So. 2d 154, 173 (La. 1974). The important point is that, since Louisiana did not get rights beyond "ordinary high water" as defined by the United States, it is incomprehensible how PPG may argue that Louisiana can claim additional rights by an expansive redefinition of "ordinary high water." Louisiana cannot claim more than it got. As a matter of fact, Louisiana jurisprudence "as it applies to state ownership of navigable waters and the soils beneath them, has followed closely and almost precisely the jurisprudence of the Supreme Court of the United States on the subject." Madden, *Federal and State Lands in Louisiana* 325-26 (1973). (Note omitted.) Indeed, *Howard v. Ingersoll, supra,* decided in 1851, has not been ignored, and has been cited twice with favor by this Court, first in *Wemple v. Eastham*, 90 So. 637, 638 (La. 1922), and then in *State v. Richardson*, 72 So. 984, 990 (La. 1916). (Note omitted.)

Id., at 15-16.

In their Reply Brief, plaintiffs argued the following:

> The PPG has repeatedly objected to the use of other states' law and federal law authorities by the Landowners for the interpretation of the words "ordinary high stage" of the river water. The Landowners have convincingly pointed out that the determination of what constitutes the "ordinary high stage" of the river water by federal courts has constitutional due process implications and cannot be ignored. In this light, federal authorities are binding rather than merely persuasive, and especially binding is *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 427, 14 L. Ed. 189 (1851). (Note omitted.)

Reply Brief on Behalf of Plaintiffs-Applicants, at 9-10.

Following the rendition of the Supreme Court of Louisiana's adverse decision, plaintiffs argued the following in their rehearing request:

> The phrase "no man is an island" applies to states in certain circumstances, even to Louisiana. One such circumstance is a consequence of the "equal footing" doctrine. While this Court states that "Louisiana is not bound to indiscriminately [follow] federal definitions of ordinary high water" because they have no connection "to our definition of batture" (Opinion, at 14), such definitions have **EVERYTHING** to do with the definition of "bank," which is also marked by the place of ordinary high water. This is so because upon its admission to the Union, Louisiana was granted the beds of all navigable rivers from ordinary high water to ordinary high water. These grants were, and the United States Supreme Court has so held, Constitutional grants and not Congressional grants. The identical grant was guaranteed to each state as it came into the Union under what is known as the "equal footing" doctrine. Louisiana than [sic] chose to cede back to its riparian owners the land between ordinary high and ordinary low water, retaining only a servitude of public use over this area of the bed of the rivers which Louisiana calls the "bank." *See Ramsey River Road Property Owners v. Reeves*, 396 So.2d 873, 875 and n.2 (La. 1981); *McCormick Oil & Gas Corp. v. Dow Chemical Co.*, 489 So.2d 1047, 1049 (La. App. 1st Cir. 1986).

However, Louisiana cannot retain rights over more area than it received from the federal government. Thus, the question of where Louisiana's property rights terminated (ordinary high water) must be resolved on the basis of the federal law that determines the exact area of the bed of rivers that Louisiana received. (Note omitted.) The United States Supreme Court has held that while federal law has no application in the resolution of disputes concerning riparian rights, federal law "fixes the initial boundary line between fast lands and the river beds [the ordinary high water mark]." *See Oregon v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 370, 97 S.Ct. 582, 587 (1977). Therefore, the federal law as interpreted by the United States Supreme Court fixes the highest extent of the state's title to the land beneath the rivers – the ordinary high water mark – and that boundary under Louisiana law is also fixed as the highest extent of batture. Indeed, *Howard v. Ingersoll*, 13 How. 381, 54 U.S. 381, 427, 14 L.Ed. 189 (1851) (Curtis, J., concurring), the seminal United States "ordinary high water" case, has not been ignored in Louisiana, and has been cited twice with favor by this Court in two cases relied upon heavily by the instant majority. *See State v. Richardson, supra*, 72 So. at 990, and *Wemple v. Eastham, supra*, 90 So. at 638.

Accordingly, there is nothing unique about Louisiana's definition of "ordinary high water." "Louisiana jurisprudence . . . as it applies to state ownership of navigable waters and the soils beneath them, has followed closely and almost precisely the jurisprudence of the

> Supreme Court of the United States on the subject." Madden, *Federal and State Lands in Louisiana*, 325-26 (1973). Most recently, Louisiana became a signatory to an interstate compact for pollution control on the Mississippi River, an agreement which applies to "the Mississippi River System from its headwaters to its mouth . . . and laterally **between its ordinary high water marks."** La. R.S. § 30:209. Nothing in this law demonstrates that Louisiana has a different notion of "ordinary high water marks" than its sister states. Nor does the United States Supreme Court decision which upheld the taking of "batture" for levee purposes without payment, *General Box Co. v. United States*, 351 U.S. 159, 76 S.Ct. 728, 100 L.Ed. 1055 (1956), suggest anything "unique" about Louisiana law. In that case, the High Court approved uncompensated use of the batture, which it defined as ordinary high water to ordinary low water, without any indication that Louisiana's definition of ordinary high water was beyond the norm.

Plaintiffs/Applicants' Application for Rehearing, at 14-15.

Finally, plaintiffs reurged the federal issue in their penultimate state court pleading:

> For these reasons and all those stated in the Landowners' original brief in support for their application, a re-hearing is respectfully requested. The damage sustained by the Landowners is not *damnum absque injuria* under Louisiana law, but damage compensable under the Federal and State Constitutions, Louisiana legislation, and jurisprudence. The majority's concluding statement that "[a] more restrictive

> meaning of ordinary high water would threaten the social utility of the [batture] exemption, as well as emasculating its practical purpose," (Opinion at 13) is a poor excuse for the uncompensated taking of these and all other Louisiana landowners' riparian properties. Exceptions are *strictissimae interpretationis* according to well-established rules of statutory interpretation. The equation of ordinary high water with the highest level that the river can be expected to reach at any season annually it [sic] is not just a play with words. The result is the emasculation of the just compensation and due process clauses of the State and Federal Constitutions, allowing political subdivisions to take heretofore firmly established private property without compensation.

Plaintiffs/Applicants' Response to Opposition to Rehearing, at 8.